No. 92-515-CSY
Status: GRANTED

Title: Wisconsin, Petitioner
v.
Todd Mitchell

Docketed:
September 21, 1992

Court: Supreme Court of Wisconsin

Counsel for petitioner: Lundsten,Paul

See also:
92-568

Counsel for respondent: Goldstein,Bernard, Casey,Kenneth P.

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1992	G	Petition for writ of certiorari filed.
3	Oct 13 1992		Order extending time to file response to petition until November 23, 1992.
4	Oct 21 1992		Brief amicus curiae of Cook County, Illinois filed. VIDED.
5	Oct 26 1992	G	Motion of Chicago Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae filed.
6	Nov 4 1992		Brief amici curiae of Anti-Defamation League, et al. filed. VIDED.
7	Nov 5 1992		Brief amici curiae of Illinois, et al. filed. VIDED.
9	Nov 23 1992		LODGING consisting of nine separate documents received from amici curiae California Assn. of Human Rights Organizations, et al.
10	Nov 23 1992	X	Brief of respondent Todd Mitchell in opposition filed.
11	Nov 23 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
12	Nov 23 1992	X	Brief amici curiae of National Asian Pacific American Legal Consortium, et al. filed.
13	Nov 23 1992	X	Brief amici curiae of California Association of Human Rights, et al. filed.
14	Nov 23 1992	X	Brief amicus curiae of Lawyers' Committee for Civil Rights of San Francisco Bay filed.
8	Nov 24 1992		DISTRIBUTED. December 11, 1992
16	Dec 3 1992	X	Reply brief of petitioner filed.
17	Dec 14 1992		Motion of Chicago Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae GRANTED.
18	Dec 14 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
19	Dec 14 1992		Petition GRANTED.
			**********
20	Dec 23 1992		Record filed.
		*	Partial proceedings Supreme Court of Wisconsin.
21	Dec 28 1992		Record filed.
		*	Certified proceedings Circuit Court of Kenosha County, Wisconsin.
22	Jan 27 1993		Brief amicus curiae of United States filed.
25	Jan 27 1993		Brief amicus curiae of Jewish Advocacy Center filed.
33	Jan 27 1993		Brief amicus curiae of American Civil Liberties Union filed.
23	Jan 28 1993		Brief amici curiae of Anti-Defamation League, et al. filed.
24	Jan 28 1993		Brief amici curiae of Crown Heights Coalition, et al. filed.
26	Jan 28 1993		Brief amici curiae of National Conference of State Legislatures, et al. filed.

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Entry	Date	Note	Proceedings and Orders
27	Jan 28 1993		Brief amici curiae of Members of Congress Charles E. Schumer, et al. filed.
28	Jan 28 1993		Brief amicus curiae of Appellate Committee of California District Attorneys Assn. filed.
29	Jan 28 1993		Brief amicus curiae of Lawyers' Comm. for Civil Rights of San Francisco Bay Area filed.
30	Jan 28 1993		Brief amici curiae of National Asian Pacific American Legal Consortium, et al. filed.
31	Jan 28 1993		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
32	Jan 28 1993		Brief amici curiae of California Association of Human Rights, et al. filed.
34	Jan 28 1993		LODGING consisting of four documents received from amici curiae California Assn. of Human Rights, et al.
35	Jan 28 1993		Brief amici curiae of Ohio, et al. filed.
36	Jan 28 1993		Brief amicus curiae of Chicago Lawyers' Committee for Civil Rights Under Law filed.
37	Jan 28 1993		Brief amicus curiae of Criminal Justice Legal Foundation filed.
38	Jan 28 1993		Brief amici curiae of City of Atlanta, et al. filed.
39	Jan 28 1993		Joint appendix filed.
40	Jan 28 1993		Brief of petitioner Wisconsin filed.
41	Feb 10 1993	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
42	Feb 22 1993		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
44	Feb 26 1993		Brief amici curiae of Larry Alexander, et al. filed.
51	Feb 26 1993		LODGING consisting of an unpublished news release from the FBI received from counsel for the respondent,
54	Feb 26 1993		Brief of respondent Todd Mitchell filed.
43	Mar 1 1993		LODGING consisting of unpublished data from the State of Wisconsin Sentencing Commission received from the respondent
45	Mar 1 1993		Brief amicus curiae of Center for Individual Rights filed.
46	Mar 1 1993		Brief amicus curiae of Reason Foundation filed.
47	Mar 1 1993		Brief amicus curiae of Wisconsin Freedom of Information Council filed.
48	Mar 1 1993		Brief amicus curiae of WI Inter-Racial and Inter-Faith Coalition for Freedom of filed.
49	Mar 1 1993		Brief amicus curiae of Ohio Public Defender filed.
50	Mar 1 1993		Brief amicus curiae of California Attorneys for Criminal Justice filed.
53	Mar 1 1993	X	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
56	Mar 1 1993	X	Brief amicus curiae of American Civil Liberties Union of Ohio filed.
58	Mar 4 1993	D	Motion of respondent for divided argument filed.
52	Mar 5 1993		SET FOR ARGUMENT WEDNESDAY, APRIL 21, 1993. (1ST CASE).
55	Mar 10 1993		CIRCULATED.

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Entry	Date	Note	Proceedings and Orders
57	Mar 10 1993	X	Brief amicus curiae of Wisconsin Association of Criminal Defense Lawyers filed.
60	Apr 1 1993	X	Reply brief of petitioner filed.
59	Apr 5 1993		Motion of respondent for divided argument DENIED.
61	Apr 21 1993		ARGUED.

(1)

No. 92-515

FILED
SEP 21 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO PETITION

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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No. _____

In The
Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI AND
APPENDIX TO PETITION

PARTIES

The petitioner is the State of Wisconsin. The respondent is Todd Mitchell, an individual convicted of felony aggravated battery with penalty enhancement under the statute at issue here.

OPINIONS BELOW

The majority and dissenting opinions of the Wisconsin Supreme Court are set forth in the Appendix (A.1-52) and

are reported at *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). The decision of the Wisconsin Court of Appeals is set forth in the Appendix (A.53–62) and reported at *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). The final trial court decision is set forth in the Appendix (A.63–71).

JURISDICTION OF THIS COURT

The State of Wisconsin seeks review of a final decision of the Wisconsin Supreme Court, rendered on June 23, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Amendment 1
United States Constitution, Amendment 14, Section 1
Wis. Stat. § 939.645 (1989–90)

These constitutional and statutory provisions are set forth in the Appendix (A.72–73).

STATEMENT OF THE CASE

Statement of Facts Supporting the Conviction

The pertinent facts were summarized by the Wisconsin Supreme Court:

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point

> discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Riddick's direction.
>
> The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

(A.3).

Description of the Penalty Enhancement Statute and Summary of the Proceedings Below

Mitchell was charged with and convicted of felony aggravated battery as a party to a crime. The State alleged and proved that Mitchell was liable for sentence enhancement for the battery under Wis. Stat. § 939.645 (1989–90), Wisconsin's penalty enhancement statute for crimes directed at persons because of their status. Mitchell was also charged with and convicted of theft as a party to a crime. But the jury determined that the State did not

meet its burden under the penalty enhancement statute with regard to that offense and, therefore, the theft conviction is not at issue here.

The Wisconsin penalty enhancement law is entitled: **"Penalty; crimes committed against certain people or property."** It authorizes increased penalties for all crimes in the Wisconsin Criminal Code if the perpetrator "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." Wis. Stat. § 939.645(1)(b) (A.72–73).

The statute does not increase minimum penalties; it increases the available maximum penalties.[1] A sentencing judge must still determine whether penalty enhancement is appropriate in a particular case.

A prerequisite to enhancement of the available penalties is the commission of a crime. A trier of fact must first find, beyond a reasonable doubt, that a defendant committed each element of a crime. Wis. Stat. § 939.645(1)(a). The fact-finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection" of the crime

[1]Although the statute does not increase the minimum penalties for any crimes, it does direct that Class A misdemeanors become felonies. Wis. Stat. § 939.645(2)(b). Thus, while the language of this subsection leaves some doubt as to whether this change in status is automatic, and while the sentencing judge remains free to impose no fine and no period of incarceration, subsection (2)(b) may constitute a single exception to the rule that the penalty enhancer statute merely gives a judge more discretion to impose an appropriate sentence. Regardless, this portion of the statute has no application to Mitchell.

victim under the penalty enhancement law. Wis. Stat. § 939.645(3).

The penalty enhancer does not require a showing of any particular motive for the intentional discriminatory selection. Rather, the State must prove the defendant "intentionally selected" the victim "because of" the victim's race, color or other listed status. Evidence of an underlying motive, such as racial hatred, may be relevant to whether intentional selection occurred, but the State is not required to prove any particular motive.

Following the presentation of evidence at Mitchell's trial, the jury found him guilty of felony aggravated battery. The jury separately found that Mitchell had intentionally selected his battery victim because of the victim's race (trial transcript at 114–15). This separate finding increased the maximum penalties Mitchell faced for the felony battery. Mitchell's exposure to a maximum two-year sentence for the underlying crime was increased by five years. The judge imposed a four-year prison sentence.

Mitchell brought a direct appeal to the Wisconsin Court of Appeals. He claimed the penalty enhancer was unconstitutionally vague and overbroad and that it violated his equal protection rights. The court of appeals rejected his vagueness and overbreadth challenges and found the equal protection claim waived (A.55, 59–61).

Mitchell appealed to the Wisconsin Supreme Court. A divided court resolved Mitchell's overbreadth claim by finding that the penalty enhancer punished thought in violation of the First Amendment and was overbroad because it chilled free speech (A.16, 19). The majority opinion did not address Mitchell's vagueness or equal protection claims.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS THE FIRST AMENDMENT ISSUE PRESENTED TO RESOLVE A CONFLICT AMONG STATE COURTS, TO PROVIDE GUIDANCE TO STATES IN THEIR EFFORTS TO DEAL WITH "HATE CRIMES" AND TO REJECT A VIEW OF THE FIRST AMENDMENT WHICH UNDERMINES ALL ANTI-DISCRIMINATION LAWS.

The State of Wisconsin, like other states and the federal government, battles discrimination on many fronts. Wisconsin has a variety of civil statutes, in areas such as housing and employment, which proscribe discrimination against persons because of characteristics having nothing to do with their qualifications. These forms of discrimination are prohibited and sanctioned because of the harm they inflict on individuals and our society as a whole.

But discriminatory acts and the laws prohibiting them are not limited to the civil arena. There are, for example, federal laws that criminalize discriminatory acts. *See, e.g.*, 18 U.S.C. § 245 and 42 U.S.C. § 3631. And, to the point here, many crimes are committed because the perpetrator wishes to hurt a member of a particular identifiable group. When discriminatory selection prompts a criminal act, additional harms are frequently present. These discrimination crimes terrorize individual victims and tear at our social fabric by spreading fear and distrust and by provoking retaliation.

Wisconsin and other states have chosen to deal with this distinct societal problem by enacting laws that enhance penalties applicable when a crime is committed because of the victim's status. Wisconsin's law is loosely patterned on model legislation developed by the Anti-

Defamation League of B'nai B'rith.[2] Over twenty states have similar laws.[3]

Although the state statutes vary in their approach, most have a core feature in common: they authorize increased or additional penalties for what is already criminal conduct if the offender commits a crime because of the race, color,

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[2]The pertinent Anti-Defamation League model reads:

2. Intimidation

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report, *Hate Crimes Statutes: A 1991 Status Report*, at 4.

[3]A listing of similar state statutes is in the Appendix (A.74-75). Also, it is noteworthy that Congress is presently considering a law which, while distinguishable from the Wisconsin law, raises the same First Amendment issue. The proposed "Hate Crimes Sentencing Enhancement Act of 1992" would direct the creation of a new sentencing guideline that enhances the offense level for "hate crimes." *See* H.R. 4797, introduced April 7, 1992 and S.R. 2522 introduced April 2, 1992 (A.76-79). A "hate crime" would be "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." (A.77).

religion, or other specified status of the victim. It is this feature which has been erroneously analyzed under the First Amendment by the *Mitchell* court.

The *Mitchell* court compounded its error by misreading this Court's recent decision in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), and by ignoring the teaching of *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). The *Mitchell* court failed to appreciate that under *R.A.V.*, the Wisconsin law is properly directed at the effects of conduct, not at speech or thought. The *Mitchell* decision also conflicts with the pronouncement in *Dawson* that relevant motivations for crimes may play a role in setting punishment. These conflicts are more fully explored below.

Since the *Mitchell* decision was issued, two other state supreme courts have addressed the First Amendment issue and come to opposite conclusions. The Ohio Supreme Court agreed with Wisconsin's high court and found that a comparable Ohio law impermissibly punishes thought. *State v. Wyant*, Case Nos. 91-199, 91-1519 and 91-1211/91-1589 (Ohio, August 26, 1992) (A.80-103). A day later the Oregon Supreme Court expressly disagreed with the Wisconsin court and held that an analogous Oregon law constitutionally proscribed a forbidden effect and was not directed at opinions or at speech on the basis of expressive content. *State v. Plowman*, Case No. S38328 (Ore. August 27, 1992) (A.104-118).[4]

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[4]Prior to the state supreme court decisions in *Mitchell*, *Wyant*, and *Plowman*, several lower state courts had reached conflicting conclusions. Some courts upheld laws against First Amendment challenges. *State v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115, 1119 (1991), *State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984), *State v. Wyant*, 1990 Ohio App. LEXIS 5589, and *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815, 820 (1988). Others found the laws to be in violation of the First Amendment. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991) (A.53) and *State v. Van Gundy*, 64 Ohio St. 3d 230, 594 N.E.2d

There is no consensus building in the courts below. Action by this Court now will eliminate the need for much of the litigation in this area, thus allowing states to proceed with proper efforts to deter and punish crimes prompted by a discriminatory motive or intent.

Perhaps more important than the effect these conflicting state court decisions have on "hate crime" laws, is their potential effect on the decades old body of federal and state anti-discrimination law. The operative language of the law at issue here is identical to traditional state and federal anti-discrimination laws. The role of motive in the penalty enhancement laws is the very same as the role of discriminatory motive in these other anti-discrimination laws. Thus, as will be developed more fully below, the *Mitchell* decision and its First Amendment analysis undermines virtually all criminal and civil anti-discrimination laws.

A decision from this Court is needed to resolve whether the *Mitchell* majority has correctly interpreted the First Amendment as it relates to penalty enhancement for crimes prompted by discrimination. This question affects not only numerous state "hate crime" laws, but nearly all state and federal anti-discrimination laws as well.

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604 (1992). In addition, the constitutionality of the Vermont law has been challenged in *State v. LaDue*, No. 91-313, now pending before that state's supreme court.

II. THE WISCONSIN SUPREME COURT'S CONCLUSION THAT THE PENALTY ENHANCEMENT STATUTE VIOLATES THE FIRST AMENDMENT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW AND CONFLICTS WITH THIS COURT'S DECISIONS IN *DAWSON v. DELAWARE* AND *R.A.V. v. CITY OF ST. PAUL.*

A. The Wisconsin Supreme Court's conclusion that consideration of motive is constitutionally impermissible in the context of a "hate crime" penalty enhancer is inconsistent with this Court's decision in *Dawson v. Delaware*.

In *Dawson*, a white defendant was convicted of murdering a white female. There was no racial motivation for the murder. This Court held that Dawson's First Amendment rights were violated at sentencing when the government introduced a short stipulation regarding Dawson's membership in a "racist prison gang" called the "Aryan Brotherhood." Admission of the stipulation was improper because there was no demonstrated connection between Dawson's gang membership and his crime or a relevant sentencing factor. *Id.* at 1097-98. This Court explained that "Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence . . . because the evidence proved nothing more than Dawson's abstract beliefs." *Dawson*, 112 S. Ct. at 1098.

At the same time, this Court made clear there is no "*per se* barrier to the admission of evidence concerning one's beliefs . . . at sentencing simply because those beliefs . . . are protected by the First Amendment." *Id.* at 1097. Thus, this Court indicated the result in *Dawson* might

have been different if, for example, "elements of racial hatred" were involved in the killing. *Id.* at 1098.[5]

Dawson teaches that when a criminal's racial beliefs are relevant to a racial hate motive for committing a crime, evidence of such beliefs is admissible at sentencing because a criminal's racial hate motivation is a proper aggravating circumstance in determining appropriate criminal punishment. *Id.* This principle is in direct conflict with the First Amendment analysis in *Mitchell*.

The *Mitchell* majority begins well enough by stating that the First Amendment protects not only speech, but also thought, no matter how abhorrent (A.7-8). But the court then assumes, without true analysis, that a motive for an executed crime is the same as pure thought for First Amendment purposes. This equating of pure thought with motivation for a criminal act leads to the court's startling conclusion that the motivation for an executed crime is "entitled to the full protection of the First Amendment." (A.14-15 n.15).

The *Mitchell* court's view fails to recognize that motivation for a crime is not abstract thought, but something inextricable from the criminal conduct. Motivation is no more "pure thought" than a criminal's intent to kill which, all by itself, transforms a lesser

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[5]The *Dawson* decision relies on *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, a sentencing judge discussed the racial motive for the murder the defendant committed and compared it with his own experience in World War II. *Id.* at 948. A plurality of this Court approved consideration of the defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949; *see also Dawson*, 112 S. Ct. at 1097. As a concluding comment the plurality stated: "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950.

homicide into first degree murder. The victim of a first degree murder and the victim of a lesser homicide are just as dead. Still, we look into a defendant's mind to differentiate levels of homicide. If this exploration of the mind reveals that death was the desired result, a greater penalty is available.

Of course in criminal law, as in discrimination law, conduct can be prohibited solely on the basis of motive. In Wisconsin it is a crime to intentionally touch the genitals of an infant "if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the [victim] or sexually arousing or gratifying the defendant." Wis. Stats. §§ 948.01(5) and 948.02(2) (1989-90). Thus, the sole difference between a legal act of bathing an infant's genitals and a sexual assault is the motive of the actor. Regardless whether it is labeled "purpose," "motive" or "intent," it is the desire of the actor that dictates whether the act is criminal.

To date, criminal jurisprudence has assumed that motive is a proper sentencing consideration and, therefore, sentencing judges have routinely considered motive when imposing sentences. For example, a robber certainly has a constitutional right to think greedy thoughts, but a judge may still reasonably determine that a robber motivated by a desire to feed his family is less culpable than a robber motivated by a desire to wear gold jewelry.

Accordingly, it was no surprise when this Court indicated in *Dawson* that evidence of racist beliefs may be properly considered at sentencing if a defendant commits a racially motivated murder.

The *Mitchell* court attempts to avoid a direct conflict with *Dawson* by asserting there is a difference between sentencing within the parameters of existing penalties for a crime and enhancing the penalties for that crime (A.16-17 n.17). The *Mitchell* court seems to believe that the logic

of this proffered distinction speaks for itself. It does not. If a motivation for an executed crime is "thought," fully protected by the First Amendment (as the *Mitchell* court asserts), there is no reason why such "thought" should enjoy less protection in the context of a sentencing conducted within the penalty range for an underlying crime than it enjoys in the penalty enhancement context. In each case, the motivation for the criminal act is the reason a defendant receives a longer sentence than would otherwise have been imposed.

Furthermore, sentencing is a power shared by the legislative and judicial branches. *Mistretta v. United States*, 488 U.S. 361, 364 (1989); *State v. Borrell*, 167 Wis. 2d 749, 767-77, 482 N.W.2d 883, 889-94 (1992). If a sentencing judge may properly consider motive, there is no reason why a legislature may not set the stage for this consideration by enacting a penalty enhancement statute geared toward that proper consideration.

Therefore, the *Mitchell* case directly presents First Amendment questions the *Dawson* case did not: first, whether states may provide for enhanced penalties for criminal acts when the state proves the offender selected the victim because of the victim's status, and, second, whether enhanced penalties may be imposed based on the motive which prompts the selection of the victim.

B. Because the Wisconsin Supreme Court misinterpreted *R.A.V.*, this case presents an opportunity to clarify the meaning of the First Amendment as it applies to laws that deter criminal conduct directed at certain groups.

1. Under the rationale of *R.A.V.*, the Wisconsin penalty enhancer does not offend the First Amendment because it is not directed at the content of any expression or belief; rather, it regulates criminal conduct directed at certain groups.

In *R.A.V.*, the St. Paul ordinance under review prohibited a subset of expressive "fighting words" based on the content of the expression. The St. Paul City Council singled out and prohibited only those "fighting words" that communicated certain types of group hatred. *Id.* at 2548. The Court held that this approach ran afoul of the First Amendment's "'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 2545.

The question presented to the *Mitchell* court was as follows: may a legislature differentiate the severity of criminal acts based on whether a crime is targeted at a victim because of the victim's status, such as race? The *Mitchell* majority and at least some of the media read *R.A.V.* as supplying a "no" answer to this question (A.15-16).[6] The petitioner disagrees. In *R.A.V.* this Court

[6]For example, the day after the *R.A.V.* decision was issued, the *New York Times* printed an analysis by Linda Greenhouse which predicted that the *R.A.V.* decision "was probably a fatal constitutional blow" at state penalty enhancement statutes. Linda Greenhouse, *High Court Voids Law Singling Out Crimes of Hatred*, New York Times, June 23, 1992, at A17.

"emphasized" that the constitutionally invalid St. Paul ordinance:

> is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . *messages* of 'bias-motivated' hatred.

Id. at 2548 (emphasis added). This language is tailor-made for the Wisconsin penalty enhancer. Substituting the word "crimes" for the term "fighting words," what Wisconsin has done is to single out "crimes that are directed at certain persons or groups . . .." No particular message differentiates these crimes from other crimes. Rather, the difference is discrimination in the victim selection process.

Thus, there is a fundamental difference between the St. Paul ordinance and the Wisconsin penalty enhancer. The St. Paul ordinance was directed at expression. It differentiated prohibited from non-prohibited expression based on the content of messages conveyed. The Wisconsin enhancer, in contrast, is directed at discriminatory criminal conduct. It differentiates based on whether the criminal act is targeted at an individual because of the person's status. The Wisconsin law does not single out any type of message a criminal might communicate by his or her crime.[7]

[7]Petitioner does not believe that the Wisconsin law is a content-based law, but even if it is, the law is permissible because it serves a compelling state interest and is "necessary" to serve that interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1851-52 (1992); *R.A.V.*, 112 S. Ct. at 2549-50. There is no doubt that a state has a compelling interest in eradicating discrimination against its citizens. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The purpose of the Wisconsin

2. The Wisconsin penalty enhancer satisfies, at least by analogy, two of the exceptions listed in the *R.A.V.* decision.

In *R.A.V.* this Court provided a nonexhaustive list of three exceptions for laws that accord differential treatment to "content-defined" subclasses of proscribable speech. *R.A.V.*, 112 S. Ct. at 2546. Assuming that the reasoning of *R.A.V.*, including these exceptions, applies when the underlying prohibited activity is criminal conduct, not speech, the Wisconsin penalty enhancer fits at least two of the three listed exceptions.

One *R.A.V.* exception is for subclasses that are "associated with particular 'secondary effects'" so that the regulation is "*justified* without reference to the content of the . . . speech.'" *R.A.V.*, 112 S. Ct. at 2546. The petitioner reads this exception as permitting subclass differentiation when legislation does not target a right protected by the First Amendment, but aims at conduct which produces a particular harm. The Wisconsin penalty enhancer complies with the "secondary effects" exception because it does not target messages or thoughts. It aims at a particular type of discriminatory conduct.

The *Mitchell* court overlooks the special harm caused by the unique class of crimes covered by the penalty enhancer. These crimes are unique because they affect not only the immediate victim, but also other members of the targeted group. For example, a racist attack on one member of a racial group spreads fear and resentment among other

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penalty enhancer is to deter acts of violence and other crimes directed at citizens because of their status; that is, to deter discrimination which takes criminal form. The law is necessary because enhanced penalties create greater deterrence, lead to increased public protection by allowing a longer quarantine period for the offender, and allow for the imposition of punishment appropriate to the more serious crime.

members of the targeted race. Moreover, these crimes have a special tendency to provoke retaliation.

What the *Mitchell* court ignores is that enhanced maximum penalties act as an enhanced deterrent for the class of heinous crimes covered by the Wisconsin law. Governments may not punish or deter ideas or beliefs, but governments can and should address harms caused by beliefs which are put into criminal action.

Another exception in *R.A.V.* applies when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. Suppression of ideas can be accomplished by a law that either directly punishes activities protected by the First Amendment or has a chilling effect on such activities. The petitioner has already demonstrated that the Wisconsin law is directed at criminal conduct; it does not punish thought or activities protected by the First Amendment. Here, petitioner will explain how the *Mitchell* court erred in its constitutional analysis relating to the chilling effect of the Wisconsin law.

The Wisconsin penalty enhancer does not chill protected First Amendment activities because it does nothing to change the manner in which evidence of such activities is used against criminal defendants. Evidence of activities protected by the First Amendment has long been used against parties in both civil and criminal actions to prove motive, intent or other contested issues.[8] And, as noted

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[8]Courts admit relevant speech and association evidence both with and without explicit consideration of its impact on First Amendment rights. *See, e.g., United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990) (evidence in discrimination crime prosecution that defendant asked to join a "skinhead" picnic admitted to show defendant would act on racial beliefs); *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986) (evidence of anti-Oriental statements used to prove racial motive for killing);

above, use of evidence of associational activity against a defendant at the sentencing stage has been approved by this Court. *See Dawson*, 112 S. Ct. at 1097.

The routine use of speech evidence leads to an observation the *Mitchell* majority has steadfastly ignored. That is, *even in the absence of the penalty enhancer*, Todd Mitchell's speech in this very case would have been admitted at his trial to prove the intent element of aggravated battery and to prove his motive for directing the attack. Moreover, Mitchell's words could have been introduced at sentencing to shed light on the true nature of his crime, his character as it relates to the crime, the danger he poses to the community and other relevant sentencing considerations.

Because enactment of the Wisconsin penalty enhancer did not alter the power of the State to use speech (or even motive) against criminal defendants, there is no reason to believe that the "official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. Certainly a government may not prohibit beliefs or ideas because they are disfavored. But nothing in the Constitution requires governmental apathy toward the special harms of bias-motivated action. Such acts "are not shielded from regulation merely because

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United States v. Redwine, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (defendant's prior statements used to prove that he acted with racial intent when firebombing the home of a black family); *United States v. Franklin*, 704 F.2d 1183 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983) (speech evidence showing defendant hated blacks offered to prove racial motive); *see also United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990). Likewise, courts exclude such evidence when it lacks relevancy. *See, e.g., Ebens*, 800 F.2d at 1432-33 (trial court erred in admitting racial statements because they were too general and too remote in time); *United States v. McCrea*, 583 F.2d 1083, 1086 (9th Cir. 1978) (trial court erred in admitting two books into evidence).

they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2547.[9]

C. The Wisconsin Supreme Court's conclusion that the First Amendment protects motivation for actions calls into question the validity of all federal and state anti-discrimination laws that premise liability on proof that an action was taken "because of" a particular status of the victim.

The operative language of the Wisconsin penalty enhancer is identical to many state and federal anti-discrimination laws. These laws impose liability when an actor takes some action "because of" the race, religion or other specified status of the affected person. *See, e.g.*, Title VII as amended by § 2000e-2(a)(1) (prohibiting various employment actions "because of [the employe's] race, color, religion, sex, or national origin"); 42 U.S.C. § 3604 (prohibiting interference with housing choices "because of [the victim's] race, color," or other listed status); and Wis. Stats. §§ 111.321-322 (prohibiting employment actions "because of" age, race, or other listed status). Consequently, many of the reasons the *Mitchell* majority finds the Wisconsin penalty enhancer unconstitutional would, if valid, apply with equal or perhaps greater force to anti-discrimination laws on the local and national level.

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[9]The *Mitchell* court's erroneous "chilling effect" analysis is also inconsistent with the statement in *Dawson* that beliefs and activities protected by the First Amendment may be considered at sentencing. If the *Mitchell* court were correct, this Court in *Dawson* should have held that evidence of activities protected by the First Amendment is inadmissible at sentencing because admission has a chilling effect on the exercise of such rights.

The *Mitchell* majority fails to answer telling questions posed by dissenting justice William Bablitch:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

(A.27, Bablitch, J., dissenting). While the *Mitchell* majority does not answer these questions, it does attempt to distinguish the penalty enhancer from other anti-discrimination laws.

The *Mitchell* court admits, as it must, that anti-discrimination laws are "concerned" with motive. But the court then states: "it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive (A.20-21 n.21). This statement contains two assertions: first, that the motivation of the offender does not affect the sanction imposed and, second, that civil anti-discrimination laws do not carry punitive sanctions. Both assertions are wrong.

First, the motive of a civil rights law violator may subject him or her to additional sanctions. For example, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages if the defendant's conduct is shown to be motivated by malice, "evil motive or intent, or when it involves reckless or callous indifference to the federally

protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988). This issue "typically demands inquiry into the actor's subjective motive and purpose." *Smith*, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

Second, contrary to the *Mitchell* court's assertion that other civil discrimination laws redress, not punish (A.20-21 n.21), punitive damages *are* awarded to punish defendants for conduct and to deter them from similar conduct in the future. *Smith*, 461 U.S. at 54, relying on Restatement (Second) of Torts § 908(1) (1979). In fact, Chief Justice Rehnquist has noted that punitive damages are "'quasi-criminal'" in nature. *Smith*, 103 U.S. at 59, quoting *Huber v. Teuber*, 10 D.C. 484, 490 (1877).

Another distinction the *Mitchell* majority relies on is its assertion that anti-discrimination laws, such as Title VII, carry only civil penalties in contrast with the penalty enhancer, which increases a criminal penalty (A.21). *Mitchell*, 169 Wis. 2d at 177, 485 N.W.2d at 817. However, this "distinction" ignores federal anti-discrimination laws that carry criminal penalties. *See, e.g.*, 18 U.S.C. § 245 (prohibiting interference with certain rights "because of [the victim's] race, color, religion or national origin") and 42 U.S.C. § 3631 (criminalizing interference with housing choices "because of" a listed status of the victim).

The *Mitchell* majority has failed to recognize the penalty enhancer for what it is: an anti-discrimination statute similar in structure and purpose to many existing anti-discrimination statutes which have repeatedly been upheld by this and other courts for decades. The Wisconsin penalty enhancer and traditional anti-discrimination laws ask the same question: did the perpetrator select the victim for a negative action because of the victim's status? To answer that question, the Wisconsin penalty enhancer and other anti-discrimination laws frequently look to the very

same evidence: the beliefs, speech and associations of the perpetrator.

The *Mitchell* decision jeopardizes our nation's body of anti-discrimination laws. The logical extension of the decision is that all anti-discrimination laws unconstitutionally punish thought and chill First Amendment rights. It follows that if *Mitchell* is allowed to stand, it will cast a dark cloud over all anti-discrimination laws in this country. Nearly a century of anti-discrimination legislation may begin to fall to similar attacks.

CONCLUSION

The petitioner's position is aptly summarized in the dissent of Wisconsin Supreme Court Justice Shirley Abrahamson. Justice Abrahamson writes:

> Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. [The Wisconsin penalty enhancer] does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate directly to the commission of a crime.

(A.25, Abrahamson, J., dissenting).

This Court should act now to true the course of constitutional analysis with regard to First Amendment limitations on the states' authority to enact penalty enhancement statutes to deal with the unique harm posed

by "hate crimes." Dozens of states hope to continue their fight against discrimination with the help of such laws and they await this Court's pronouncement.

Respectfully submitted,

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APPENDIX

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169 Wis. 2d 153
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL,
Defendant-Appellant-Petitioner.
Supreme Court

No. 90-2474-CR. Oral argument February 26, 1992.
Decided June 23, 1992

(Reversing and remanding,
163 Wis. 2d 652, 473 N.W.2d 1
(Ct. App. 1991).)

(Also reported in 485 N.W.2d 807.)

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

HEFFERNAN, CHIEF JUSTICE. This is a review of a published decision of the court of appeals, *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991), which affirmed judgments of the circuit court for Kenosha county, Jerold W. Breitenbach, Circuit Judge, adjudging Todd Mitchell guilty of aggravated battery, party to a crime, and adjudging that Mitchell intentionally selected the battery victim because of the victim's race in violation of the hate crimes penalty enhancer, sec. 939.645, Stats. Mitchell challenged the constitutionality of the sec. 939.645, Stats., on appeal, and the court of appeals held that the statute was constitutional. We conclude that the statute unconstitutionally infringes upon free speech, and reverse the decision of the court of appeals.

The sole issue before the court is the constitutionality of sec. 939.645, Stats., the "hate crimes" statute.[1] Mitchell asserts that the statute on its face violates: (1) his right of free speech guaranteed by the First Amendment and (2) his right to due process and equal protection of the laws

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[1]At the time of Mitchell's crimes, sec. 939.645, Stats. 1989-90, provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

guaranteed by the Fourteenth Amendment. We hold that the statute violates the First Amendment and is thus unconstitutional.[2]

The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Riddick's direction.

The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Sections 939.05 and 940.19(1m), Stats. The jury separately found that Mitchell intentionally selected Riddick as the battery victim because of Riddick's race. The aggravated battery conviction carried a maximum sentence of two years, secs. 940.19(1m) and 939.50(3)(e), Stats. Because the jury found that Mitchell selected

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[2]Because of our holding, we do not address Mitchell's Fourteenth Amendment vagueness and equal protection claims.

Riddick because of Riddick's race, sec. 939.645(2)(c), Stats., increased the potential maximum sentence for aggravated battery to seven years. The trial court sentenced Mitchell to four years for the aggravated battery.[3]

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crimes statute. On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crimes statute was neither vague nor overbroad. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). We granted Mitchell's petition for review on the issue of the constitutionality of the hate crimes statute, and now reverse.[4]

This case presents an issue which has spawned a growing debate in this country: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crimes statutes and some vigorously in

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[3]Mitchell was also convicted of theft, party to a crime, sec. 943.20(1)(a) and (3)(d)2, Stats. The circuit court imposed and stayed a four year sentence for the theft conviction and imposed a four year period of consecutive probation. The circuit court did not find that the theft violated the hate crimes statute. The court of appeals rejected Mitchell's challenges to the theft conviction, *Mitchell*, 163 Wis. 2d at 664-65, and that portion of the court of appeals decision is not before the court.

[4]*Amicus curiae* briefs were filed with the court on behalf of two separate coalitions: the National Association of Criminal Defense Lawyers, the Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender; and the Anti-Defamation League of B'nai B'rith, the Milwaukee Jewish Council, the Wisconsin Jewish Conference, the Milwaukee Urban League, the Madison Urban League, Inc., the NAACP--Milwaukee Branch, and the Madison Community United, Inc.

opposition.[5] Individuals and organizations traditionally allied behind the same agenda have separated on the issue of the legitimacy of hate crimes statutes. As one commentator noted:

> [T]he debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once.

Susan Gellman, 39 U.C.L.A. L. Rev. at 334 (emphasis in original).

Statistical sources indicate that incidents of all types of bias related crime are on the rise. Joseph M. Fernandez, *Bringing Hate Crime Into Focus--The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R.-C.L. L. Rev. 261

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[5]*See, e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333 (1991); and Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845 (1990). Similarly, numerous courts and commentators are currently struggling with the constitutional implications of college campus "hate speech" rules. *See, e.g., UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484; and Katherine T. Bartlett and Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 Duke L.J. 574.

(1991); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845, 845-46 (1990). Between 1980 and 1986, three thousand incidents of bias related violence were documented. *Id.* at 846. The Anti-Defamation League of B'nai B'rith (ADL) reports that "[d]uring 1990 there were 1685 anti-Semitic incidents reported to the Anti-Defamation League from 40 states and the District of Columbia." 1990 Audit of Anti-Semitic Incidents, Anti-Defamation League of B'nai B'rith 1 (1990). This was the highest total ever reported in the twelve year history of the audit. *Id.* The National Gay and Lesbian Task Force reported 7031 incidents of anti-gay violence in 1989. Anti-Violence Project, National Gay and Lesbian Task Force (NGLTF), Anti-Gay Violence, Victimization and Defamation in 1989 (1990). *See also* Developments in the Law--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1541-42 (1989).

In response to the recent rise in hate crimes, the United States Congress enacted the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. The purpose of the Act is to establish a national data collection system for compilation of statistics concerning bias-related crimes. The Act requires the Attorney General to publish an annual summary of the findings. *See generally*, Fernandez, *supra*.

At the state level, the response to reports of bias related crime has been significant. Nearly every state in the country has enacted some form of hate crime legislation. *See* ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, Appendix C, pp. 24-26 (1991). The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the potential penalty for a criminal actor if the state proves that the actor intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

The first step in reviewing a constitutional challenge to a statute is to determine which party bears the burden of

proving its constitutionality or unconstitutionality. While the party challenging the statute ordinarily bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional, *Bachowski v. Salamone*, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987), the burden shifts to the proponent of the statute to establish its constitutionality when the statute encroaches upon First Amendment rights. *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991). Because the hate crimes statute punishes the defendant's biased thought, as discussed below, and thus encroaches upon First Amendment rights, the burden is upon the state to prove its constitutionality.

The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech.

The First Amendment of the United States Constitution states bluntly: "Congress shall make no law . . . abridging the freedom of speech."[6] The First Amendment protects not only speech but thought as well. "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977). Even more fundamentally, the constitution protects all speech and thought, regardless of how offensive it may be. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397,

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[6]Article I, section 3 of the Wisconsin Constitution provides in equally sweeping language that "no laws shall be passed to restrain or abridge the liberty of speech."

414 (1989).[7] As Justice Holmes put it: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled*, *Girouard v. United States*, 328 U.S. 61 (1946).[8]

Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

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[7]*See also R.A.V. v. City of St. Paul*, No. 90-7675, 1992 LEXIS 3863, at *9, --- U.S. --- (June 22, 1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. Rockford*, 408 U.S. 104, 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966); and *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

[8]As was said in a statement attributed to Voltaire, surely one of the philosophical ancestors of our American constitution: "I disapprove of what you say but I will defend to the death your right to say it."

Construing the model hate crimes statute designed by the Anti-Defamation League of B'nai B'rith (ADL), upon which the Wisconsin hate crimes statute is apparently loosely based,[9] one author provides the following insightful analysis:

> Under the ADL model, a charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere in a state's criminal code. As those offenses are already punishable, all that remains is an additional penalty for the actor's *reasons* for his or her actions. The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield.

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[9]The ADL model statute provides:

> A. A person commits the crime of intimidation if, *by reason of* the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
>
> B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, p. 4 (1991) (emphasis added). While the Wisconsin statute substitutes the phrase "because of" for "by reason of," it is clear that both statutes are concerned with the actor's reason or motive for acting.

> Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts.

Susan Gellman, 39 U.C.L.A. L. Rev. 333, 363 (1991).[10] Because all of the crimes under chs. 939 to 948, Stats., are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.

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[10]*See also State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984). In *Beebe*, the Court of Appeals of Oregon interpreted an ethnic intimidation statute fashioned after the ADL model, ORS 166.155(1), and recognized that the statute punished motive:

> The statute does not offer more protection to any class of victims. Anyone may be a victim of bigotry. It is the defendant who classifies, and he does so by his *motive*. The statute distinguishes between acts of harassment which are *motivated by racial, ethnic or religious animus* and acts of harassment which are not so motivated.

Id. at 13 (emphasis added). In *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988), the court interpreted New York's hate crimes statute which prohibits persons from subjecting persons to physical contact "because of" their protected status. In that case, the court stated: "Section 240.30(3), both on its face and as applied in this case, regulates violent conduct, and physical intimidation, when committed intentionally *and because of racial, religious or ethnic prejudice*." *Id.* at 817 (emphasis added). Finally, in *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894, 896 (1991), the court upheld a conviction under Maryland's hate crimes statute, Md. Ann. Code art. 27, § 470A(b)(3) (Supp. 1990), in part because the defendant's conduct "overwhelmingly demonstrate[d] his actions were *motivated by racial animus*." (Emphasis added.)

While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of offensive motive or thought.[11]

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[11]There seems to be considerable confusion regarding the meaning and effect of "motive" in criminal law. As Black's Law Dictionary 810 (6th ed. 1990) states in its definition of "intent":

> Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

This confusion is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" at p. ___ as "a purpose to do the thing or cause the result specified," correctly recognizes at pp. ___ n. 2 that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

In this case the crime was aggravated battery, and the necessary intent under sec. 940.19(1m), Stats., is an "intent to cause great bodily harm." Quite clearly, Mitchell's intent to cause great bodily harm to Riddick is distinct from his motive or reason for doing so. Criminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so.

As explained by Professor Gellman:

> "Motive," "intent," and "purpose" are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor's reason for acting, the "why" as opposed to the "what" of conduct. Unlike purpose or

The conduct of "selecting" is not akin to the conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.[12]

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intent, motive cannot be a criminal offense or an element of an offense.

. . . .

The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same conduct, as compared to the effect (or lack thereof) of altering the motive. Continuing with the example of burglary, changing the *purpose* of the break-in changes the very nature of the act: if *A* broke into *B*'s house for the purpose of getting *A*'s own property (not a criminal purpose), the act of breaking in is simply breaking and entering or trespass, not burglary, even if *A*'s motive was identical (the desire to pay his debts). By contrast, changing *A*'s *motives*, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his *purpose* was that of committing the crime of theft in *B*'s house, does *not* change the nature of the act: it is still burglary.

Susan Gellman, 39 U.C.L.A. L. Rev. at 364–65 (emphasis in original). While the state speaks of the "intentional" aspect of the hate crimes statute, when the focus is on the "selects . . . because of" aspect of the law, it becomes clear that it is the actor's motive which is targeted and punished by the statute.

[12]In fact, on May 13, 1992, the legislature amended sec. 939.645, Stats., to apply specifically where the selection is "in whole or in part because of the actor's belief or perception regarding" the victim's status "whether or not the actor's belief or perception was correct." 1991 Wis. Act 291. Sections 939.645(1)(b) and (4), Stats., currently provide (with the substantive changes highlighted):

In this case, Todd Mitchell selected Gregory Reddick because Reddick is white. Mitchell is black. The circumstantial evidence relied upon to prove that Mitchell selected Reddick "because" Reddick is white included Mitchell's speech--"Do you all feel hyped up to move on some white people?"--and his recent discussion with other black youths of a racially charged scene from the movie "Mississippi Burning." This evidence was used not merely to show the intentional selection of the victim, but was used to prove Mitchell's bigoted bias. The physical assault of Reddick is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's bigoted motivation for selecting Reddick, his thought which impelled him to act, is the

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(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) *in whole or in part* because of *the actor's belief or perception regarding* the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct*.

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry *or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry* is required for a conviction for that crime.

Thus the legislature has removed any doubt that the aim of the statute is the actor's subjective motivation. The dissenting opinions ignore this legislative clarification in their refusal to recognize that the statute is focused upon and punishes the defendant's motive.

reason that his punishment was enhanced. In Mitchell's case, that motivation was apparently a hatred of whites.[13]

The statute commendably is designed to punish--and thereby deter--racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech. The state would justify its transgression against the constitutional right of freedom of speech and thought because its motive is a good one, but the magnitude of the proposed incursion against the constitutional rights of all of us should no more be diminished for that good motive than should a crime be enhanced by a separate penalty because of a criminal's bad motive.[14]

The state admits that this case involves legislation that seeks to address bias related crime. The only definition of "bias" relevant to this case is "prejudice." A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor--his or her prejudice. Punishment of one's

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[13]While the statute as written may extend to situations where the actor in fact is not biased, this does not save the statute. The legislature may not subvert a constitutional freedom--even one as opprobrious as the right to be a bigot--by carefully wording a statute to affect more than simply that freedom.

[14]As has long been recognized, the road to hell is paved with good intentions. See George Herbert, *Jacula Prudentum* (1640); Samuel Johnson, from James Boswell, *Life of Dr. Johnson* (1791); George Bernard Shaw, *Maxims for Revolutionists*; and others. Or as the latin poet Virgil said in the *Aeneid* in a reference to the slippery slope, "Facilis descensus Averno," which liberally translated means "Beware that first false step." Eugene Ehrlich, *Nil Desperandum* 107 (Guild Publishing 1987).

thought, however repugnant the thought, is unconstitutional.[15]

In *R.A.V.*, *supra*, decided June 22, 1992, the United States Supreme Court held that a Minnesota ordinance prohibiting bias-motivated disorderly conduct[16] was facially invalid under the First Amendment. Accepting the Minnesota Supreme Court's determination that the ordinance reached only expressions that constituted "fighting words" within the meaning of *Chaplinsky*, the Court held that the government may not constitutionally regulate even otherwise unprotected speech on the basis of hostility towards the idea expressed by the speaker. *R.A.V.*, 1992 U.S. LEXIS 3863, at *24-28. In other words,

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[15]Of course, freedom of speech is not absolute. For example, the government may regulate or punish "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). Also, the government may regulate expressive conduct where there is an important governmental interest and the regulation is narrowly tailored to address that interest. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The bigoted thought which is punished by the hate crimes statute fits neither category. While an individual's bigoted speech may occasionally provoke retaliation, a person's thought will not. Nor is it argued that a hate crime is protected expressive conduct. It is not. Rather, a person's bigoted thought, the very thing punished by the hate crimes statute, is entitled to the full protection of the First Amendment.

[16]The ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990), provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

while the government may regulate all fighting words, it may not regulate only those fighting words with which it disagrees. Such a prohibition is nothing more than a governmental attempt to silence speech on the basis of its content. *Id.* at *26.

While the St. Paul ordinance invalidated in *R.A.V.* is clearly distinguishable from the hate crimes statute in that it regulates fighting words rather than merely the actor's biased motive, the Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees. The Court stated:

> [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at *32-33 (footnote omitted). The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance--racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content.

Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought.[17]

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[17]The dissent of Justice Bablitch asserts that punishing motive is permissible, based upon *Dawson v. Delaware*, 90-6704 (U.S. Supreme Court, March 9, 1992), wherein the United States Supreme Court indicated that evidence of a convicted murderer's bigoted motivation in committing the murder is a relevant inquiry in sentencing. Dissenting Op. at ____. The dissent is

The hate crimes statute is also unconstitutionally overbroad. A statute is overbroad when it intrudes upon a substantial amount of constitutionally protected activity. Aside from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect upon free speech. As we explained in *Bachowski*:

> A [statute] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski, 139 Wis. 2d at 411 (citations omitted). The chilling effect need not be evident in the defendant's case; it is enough if hypothetical situations show that it will chill the rights of others. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). Finally, "[i]n the First Amendment context, 'criminal statutes must be scrutinized with particular care . . ..'" *R.A.V.*, 1992 U.S. LEXIS 3863, at *63, (White, J., concurring), *citing Houston v. Hill*, 482 U.S. 451, 459 (1987).[18]

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wrong. Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

[18]In *R.A.V.*, four Justices disagreed with the analysis of the majority, but concurred in the judgment because they concluded that the Minnesota ordinance is fatally overbroad because it "makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." *R.A.V.*, 1992 U.S. LEXIS 3863, at *58-64 (White, J., concurring).

The state admits as it must that speech may often be used as circumstantial evidence to prove the actor's intentional selection. This case is a perfect example. Mitchell's speech is the primary evidence of his intentional selection of Riddick. The use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection, makes it apparent that the statute sweeps protected speech within its ambit and will chill free speech.

The criminal conduct involved in any crime giving rise to the hate crimes penalty enhancer is already punishable. Yet there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone--a misdemeanor--but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A intentionally selected B because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.

And of course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech. As Professor Gellman explains:

> In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books

> ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.
>
> . . .
>
> It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Susan Gellman, 39 U.C.L.A. L. Rev. at 360-61 (emphasis in original) (citations omitted).[19]

Thus, the hate crimes statute is unconstitutionally overbroad because it sweeps protected First Amendment speech within its reach and thereby chills free speech.

Finally, we consider the argument advanced by the *amici curiae* ADL, et al., and embraced by the dissent that an analogy exists between the hate crimes statute and

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[19] *See, e.g, Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991) (fact that arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults and engaging in racial confrontations" supported conclusion that officer had probable cause to arrest).

antidiscrimination laws, and that the numerous United States Supreme Court decisions upholding antidiscrimination laws lend support to the hate crimes statute.[20] We disagree.

Discrimination and bigotry are not the same thing. Under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the "selection" which is punished is not an act, it is a mental process. In this case, the act was the battery of Riddick; what was punished by the hate crimes statute was Mitchell's reason for selecting Riddick, his discriminatory motive.

As explained above, selection under the hate crimes statute is solely concerned with the subjective motivation of the actor. Prohibited acts of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and analogous state antidiscrimination statutes, such as refusal to hire, termination, etc., involve objective acts of discrimination. What is punished by the hate crimes penalty enhancer is a subjective mental process, not an objective act. The actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act.[21]

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[20]*See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Runyan v. McCrary*, 427 U.S. 160 (1976).

[21]The dissenting opinion of Justice Bablitch recites that it does not understand this "very complicated and elaborate distinction" between the hate crimes penalty enhancer and antidiscrimination statutes. That is interesting in light of the dissent's recognition at ____ that the statute applies to the

Finally, there is a difference between the civil penalties imposed under Title VII and other antidiscrimination statutes and the criminal penalties imposed by the hate crimes law, and contrary to the dissent's protestations, it is a difference that matters.[22] The difference is that while the First Amendment may countenance slight incursions into free speech where the overarching concern is protection from objective acts of bigotry in the employment marketplace and the adverse consequences of such acts on the civil rights of minorities, the First Amendment will not allow the outright criminalization of subjective bigoted thought. We have little doubt that an antidiscrimination statute which criminalized an employer's subjective discrimination, with nothing more, would be unconstitutional. This apparent schism in the First Amendment's protective shield is perhaps best understood in the context of overbreadth. A statute criminalizing the bigoted selection of a victim will chill free speech to a much greater extent than a statute imposing civil penalties for objective discriminatory acts.

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defendant's "selection decision," an obviously subjective mental process. To state that a "decision" is analogous to the conduct proscribed by antidiscrimination statutes is untenable. We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

We repeat. The hate crimes statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. Taking the dissent's explanation that the statute is concerned with the "decision" of the defendant, it is clear that the hate crimes statute creates nothing more than a thought crime. Apparently that dissent is comfortable with such an Orwellian notion; we are not.

[22]*See* Bablitch, J., dissenting, at ____ n. 2, ____ n. 3, ____ and ____.

In the wake of the Los Angeles riots sparked by the acquittal of four white police officers accused of illegally beating black motorist Rodney King, it is increasingly evident that racial antagonism and violence are as prevalent now as they ever have been. Indeed, added to the statistical compilation of bias related crimes could be the vicious beating of white truck driver Reginald Denny by black rioters, horrifyingly captured on film by a news helicopter. As disgraceful and deplorable as these and other hate crimes are, the personal prejudices of the attackers are protected by the First Amendment. The constitution may not embrace or encourage bigoted and hateful thoughts, but it surely protects them.

Because we wholeheartedly agree with the motivation of the legislature in its desire to suppress hate crimes, it is with great regret that we hold the hate crimes statute unconstitutional--and only because we believe that the greater evil is the suppression of freedom of speech for all of us.

By the Court.--The decision of the court of appeals is reversed and the cause remanded to the circuit court for resentencing on the aggravated battery conviction.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). Today, this court concludes that sec. 939.645, Stats. 1989-90, is unconstitutional, holding that it violates the First Amendment right to freedom of speech.[1]

The Constitution teaches mistrust of any government regulation of speech or expression. Had I been in the legislature, I do not believe I would have supported this statute. I do not think this statute will accomplish its goal; I would direct the state's efforts to protect people from invidious discrimination and intimidation in other directions. As a judge, however, after much vacillation, I

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[1]1991 Wis. Act 291 is not before us.

conclude that this law should be construed narrowly and should be held constitutional.

This case presents a very difficult question involving the convergence of three competing societal values--freedom of speech, equal rights, and protection against crime.

Freedom of speech is the most treasured right in a free, democratic society. Our constitution protects our right to think, speak and write as we wish. This freedom of expression encompasses all speech, pleasant or unpleasant, popular or unpopular. Even expressions of bigotry are protected. Our constitutional history makes clear that expression hostile to the values of our country should be addressed with more speech, not suppressed with police power.

Nevertheless, our law recognizes the harmful effects of invidious classification and discrimination. We acknowledge that when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone. In addition to the injury inflicted, the victim may suffer feelings of fear, shame, isolation and inability to enjoy the rights and opportunities that should be available to all persons. Furthermore, all members of the group to which the victim belongs may suffer when the individual is victimized. The state has determined that harms inflicted because of race, color, creed, religion or sexual orientation are more pressing public concerns than other harms. The state has legitimate, reasonable and neutral justifications for selective protection of certain people.[2] "In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed . . . it is

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[2]*R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*67, *81-*82, Stevens, J., concurring).

compelling."[3] The state has a compelling interest in combating invidiously discriminatory conduct, even when the conduct is linked to viewpoints otherwise protected by the First Amendment.

In addition, our government has a compelling interest in preserving the peace, in protecting each person from crime and from the fear of crime.

Section 939.645 addresses only those crimes committed "because of" the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry." It does not punish all crimes committed by persons who have expressed bigoted beliefs. An individual may commit a criminal act. That same individual may possess or express bigoted beliefs. These two facts standing alone, however, do not subject that individual to punishment under sec. 939.645.

In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime.

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[3] *R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*51, White, J., concurring).

Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Read narrowly as the legislature intended, this statute is a prohibition on conduct, not on belief or expression. The statute does nothing more than assign consequences to invidiously discriminatory acts.

The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. Section 939.645 does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate directly to the commission of a crime.

The United States Supreme Court's recent decision in *R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992), has not persuaded me to the contrary. In *R.A.V.*, the Supreme Court held unconstitutional a St. Paul ordinance prohibiting placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . .." The majority opinion in *R.A.V.* ruled the ordinance facially unconstitutional because, even assuming that the ordinance only regulated "fighting words," the ordinance

was based on the content of the ideas expressed by a defendant. The four concurring justices found the ordinance unconstitutional on the ground that the statute was an overbroad prohibition of fighting words.

R.A.V. does not control this case. Section 939.645 is not similar to the St. Paul ordinance; its validity does not rely on the "fighting words" doctrine. The defendant in *R.A.V.* was also charged under a state statute, sec. 609.2231(4), Minn. Stats. 1990, much more similar to sec. 939.645 than the St. Paul ordinance, but the defendant did not challenge that charge.

For the reasons set forth, I dissent.

WILLIAM A. BABLITCH, J. (*dissenting*).

> everywhere the crosses are burning, sharp-shooting goose-steppers around every corner, there are snipers in the schools . . . (I know you don't believe this. You think this is nothing but faddish exaggeration. But they are not shooting at you.)
>
> Lorna Dee Cervantes[1]

The law in question is not a "hate speech" law.

Nor is it really a "hate crimes" law as it has been somewhat inappropriately named.

It is a law against discrimination--discrimination in the selection of a crime victim.

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[1]Cervantes, Poem for the Young White Man Who Asked Me How I, An Intelligent Well Read Person Could Believe in the War Between Races, in M. Sanchez, Contemporary Chicana Poetry 90 (1986).

Today the majority decides that the same Constitution which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime. Numerous federal and state laws exist which prohibit discrimination in the selection of who is to be hired, or fired, or promoted. No one seriously (at least until today) questions their constitutionality. Yet the majority today gives constitutional protection to discrimination in the selection of who is to be the victim of a crime. Both sets of laws involve discrimination, both involve victims, both involve action "because of" the victim's status.

The majority says there is a difference in the two types of laws. They are wrong. There is no support in law or logic for their position. How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

These are laws against discrimination, pure and simple. Dictionaries do not disagree on the meaning of the term discrimination: to distinguish, to differentiate, to act on the basis of prejudice. Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts "because of" the victim's protected status. These exact words appear in most, if not all antidiscrimination laws. These exact words appear in the laws before us today.

Yet the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest.

The majority rationalizes their conclusion by insisting that this statute punishes bigoted thought. Not so. The statute does not impede or punish the right of persons to have bigoted thoughts or to express themselves in a bigoted fashion or otherwise, regarding the race, religion, or other status of a person. It does attempt to limit the effects of bigotry. What the statute does punish is acting upon those thoughts. It punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them. The majority says otherwise. I disagree.

I conclude the statute in question is neither vague nor overbroad, nor does it offend equal protection. Accordingly, I dissent.

I.

Examples of shocking bias related crimes making headlines recently include:

> [A] white man assaults a black woman, rips off her clothes, douses her with lighter fluid and, yelling 'nigger', threatens to set her on fire.
>
> According to police in a Washington suburb, the attack capped a night in which two young white men planned to hunt down blacks in revenge for being called 'honkies', a derogatory term blacks use for whites.
>
> They pounced on two black women walking towards a shopping centre early in the morning. One

> escaped and ran for help, the other was beaten, stripped nearly naked, and sprayed with lighter fluid. Bernd Debusmann, *Hate Crime Shocks Washington, Shows Race Problems*, Reuters, March 4, 1992.
>
> In Kentucky this September, assailants beat a young gay man with a tire iron, locked him into a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage. Neal R. Peirce, *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.
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> Amber Jefferson, a 15 year-old high school cheerleader in Orange County, Calif., almost lost her life because of the fact that she has one white and one black parent. Four attackers, allegedly all white, beat her with a baseball bat and split her face open with a shard of plate glass. Surgery to fix the wounds took 10 hours. It will be two years before she regains muscle control in her face. *Id.*
>
> The 120 boys at Valley Torah High typically spend half their school day in college prep classes and half in religious instruction.
>
> But for the past week--since their school was painted with swastikas, Ku Klux Klan symbols and Jewish slurs--they have been getting an education in hate. Sally Ann Stewart, *Hate Crimes: 'Litany of shame'* // Incidents on rise in California, USA Today, March 13, 1992, at 3A.

Wisconsin has also not been immune from reprehensible incidents of bias related crime:

> Anti-Semitic attacks erupt regularly, even at such supposedly progressive, enlightened institutions as

> the University of Wisconsin (Madison), where a Jewish student center has been pelted with rocks and bottles and where Jewish fraternities and sororities have been vandalized. Counselors at a Madison Jewish day camp discovered that the brake linings had been cut on a bus used to transport children--fortunately before the bus was used. A Madison synagogue, after repeated anti-Semitic incidents, was kept under armed guard for a time. *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

In 1987, the Wisconsin legislature acted to alleviate bias related crime. The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the penalty a perpetrator receives if the State of Wisconsin (State) proves that the perpetrator intentionally selected the victim because of the victim's race, religion, color, or other protected status.

I first address Mitchell's and the majority's overbreadth argument. A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called 'chilling effect.'" *Id.* An overbreadth challenge may be based on hypothetical speculation and does not require the presence of a "chilling effect" in the defendant's particular case. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). This court has also held that where possible we must interpret a statute to avoid constitutional invalidity. *Bachowski*, 139 Wis. 2d at 405.

I conclude that the First Amendment is not implicated in this case. However, in concluding that the challenged

statute is constitutional I do not take lightly the First Amendment issue that Mitchell has raised. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

I reject the majority's and Mitchell's argument that sec. 939.645, Stats., punishes or has a chilling effect on free speech. The penalty enhancement statute is directed at the action or conduct of selecting a victim and committing a crime against that victim because of his or her protected status. The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive.[2] The

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[2]One of the majority's chief contentions seems to be that the statute is unconstitutional because it punishes motive. Although I do not think that this statute punishes motive, even if it did, I have serious doubts about the majority's conclusion that punishing motive is impermissible under the First Amendment. The majority cites no authority to support its conclusion that punishing motive is impermissible under the First Amendment. In fact, the majority fails to explain why, under its analysis, it is impermissible for the penalty enhancer statute to punish a discriminatory motive, yet permissible for antidiscrimination statutes to punish a discriminatory motive. *See, e.g., Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 424-425 (1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987) ("it is merely concluded that the company's pre-discharge conduct toward plaintiff was not based on anti-female animus. Absent such animus, there can be no violation of Title VII"); *E.E.O.C. v. Maxwell Co.*, 726 F.2d 282 (1984). In fact one writer commenting on Title VII is at complete odds with the majority's analysis of motive under the criminal law. He writes:

> Title VII was passed because Congress perceived that actions resulting from bad thoughts were sufficiently pervasive to substantially limit economic opportunities of blacks. 'Bad thoughts' is, of course, shorthand for a wide range of interior activities which are the necessary

statute does not impede or punish the right of persons to have thoughts or to express themselves regarding the race, religion, or other status of a person. The statute's concern is with criminal conduct plus purposeful selection. By enhancing the penalty, the penalty enhancer statute punishes more severely criminals who act with what the legislature has determined is a more depraved, antisocial intent: an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status. The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by

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predicate for disparate treatment liability. A more common terminology is 'prohibited considerations,' but 'bad thoughts' describes more graphically what disparate treatment entails.

. . ..

The notion of bad thoughts is not peculiar to disparate treatment discrimination under Title VII. It has played an important role in the Court's constitutional decisions over the last two decades in contexts ranging from equal protection to freedom of speech and religion. Nor is such concern new in the law. Modern criminal law has always manifested a concern for motivations under the rubric of mens rea. In the discrimination context, however, motivations are both more important and more elusive than in criminal law because the 'conduct' violating Title VII is neutral or positive except when it springs from bad thoughts. In the criminal context, much prohibited conduct is itself suspect. Charles A. Sullivan, Accounting for *Price Waterhouse*: Proving Disparate Treatment Under Title VII, Brooklyn L. Rev. 1107, 1139–1140 (1991).

a defendant.[3] However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection. Permitting the use of such evidence does not chill free speech. Just as words of defendants are frequently used to prove the element of intent in many crimes without violating the First Amendment, words may be used to prove the act of intentional selection. It is no more a chilling of free speech to allow words to prove the act of intentional selection in this "intentional selection" statute than it is to allow a defendant's words that he "hated John Smith and wished he were dead" to prove a defendant intentionally murdered John Smith.

The use of speech under the penalty enhancer is not different than its use in prosecutions under antidiscrimination laws or fair housing discrimination laws. Antidiscrimination statutes often employ terms

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[3]The majority essentially contends that the use of speech as circumstantial evidence impermissibly chills free speech. Once again the majority fails to explain why this is not also true in antidiscrimination cases. For example, under Title VII sexual harassment jurisprudence, an employee's or employer's sexist speech is not merely evidence of prohibited conduct; it is the prohibited conduct. *See, e.g., Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782–83 (E.D. Wis. 1984) (in three-year period, 75 sexually explicit drawings posted on pillars and other conspicuous places in the workplace); *Volk v. Coler*, 845 F.2d 1422, 1426–27 (7th Cir. 1988) (plaintiff alleged, among other things, that her supervisor called her and other female employees 'hon,' 'honey,' 'babe' and 'tiger.') *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may be sufficient to show a hostile work environment). *See also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

similar to those contained in the penalty enhancer. For instance, secs. 118.13, 111.321, 101.225, and 66.395, Stats., all prohibit certain conduct that occurs either "because of" or "on account of" or "on the basis of" a status of another person. Proof of violations of these statutes will often involve proof of words used by the violators. Under these statutes and the penalty enhancer, a particular action or conduct is being punished, and speech may be used to prove the conduct. Under the penalty enhancer statute, speech is simply probative of the element of intentional selection. The use of such evidence does not violate the First Amendment. The action of intentional selection is punished, and the words used by a defendant are merely evidence of an intentional selection.

Although the majority attempts to distinguish this statute and antidiscrimination statutes, its distinction is a distinction without a difference. The majority at ____ states that the penalty enhancer statute is unconstitutional because the statute does not punish only the conduct of intentional selection of a victim "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim . . .." On page ____, the majority abandons this reasoning when applied to antidiscrimination laws. The majority posits that the distinction between the penalty enhancer statute and antidiscrimination laws is that antidiscrimination laws punish only the discrimination, i.e., the refusal to hire, not the discriminatory motive. The majority forgets a key requirement of antidiscrimination statutes. Antidiscrimination statutes do not prohibit a person from not hiring someone of a protected class, they prohibit a person from not hiring someone of a protected class *because* or *on the basis of* his or her protected class. It is not, as the majority suggests, the failure to hire that is being punished, it is the failure to hire because of status. How can the majority find the penalty enhancer statute unconstitutional because it punishes the "because of" aspect of a selection process, and at the same time conclude that antidiscrimination statutes, which do the

same thing, are constitutional? The majority at the least ought to answer this question.

The majority also attempts to explain its very complicated and elaborate distinction between this statute and antidiscrimination laws based on some sort of difference between subjective motivations and objective acts. Although I do not quite understand the majority's use of the terms objective and subjective in the context of this case, I interpret the majority's argument to be that this statute is unconstitutional because it punishes the subjective motivations of the actor, while discrimination statutes involve objective acts of discrimination. This is merely the same distinction without a difference referred to above. Like antidiscrimination statutes, the penalty enhancer statute involves an "objective act"--the criminal conduct, e.g., the battery, etc. Likewise, despite the majority's contentions to the contrary, under the majority's analysis antidiscrimination statutes, because they require that the act be "because of" the protected status of the victim, implicate and punish the subjective motive of the actor. For example, in disparate treatment cases (cases in which the discrimination alleged is overt discrimination as opposed to disparate impact where the practices are fair in form, but discriminatory in operation) a person simply does not violate Title VII for refusing to hire a person of a protected status. The objective act alone does not invoke the provisions of the statute. Rather, the refusal must be "because of" the victim's protected status. Assuming that the majority is correct that this statute punishes motive, it fails to explain how the enhancer is any different from antidiscrimination laws.

If one assumes that the majority is correct that the penalty enhancer punishes motive there is only one distinction between it and antidiscrimination laws. The only distinction that exists between the penalty enhancer statute and antidiscrimination statutes is that the objective acts that are punished are different in that antidiscrimination laws punish legal conduct plus bad

motive and the enhancer punishes criminal conduct plus bad motive. While it is true that this is a distinction, the majority never explains why it is a distinction that matters. Why is it permissible to punish motive when it is accompanied by legal conduct and impermissible to punish motive when it is accompanied by illegal conduct. The majority does not give an answer to this question, it merely concludes that the distinction somehow makes a difference. Saying so, again and again, does not make it so.

Lastly, even assuming that the majority is correct in saying that this statute punishes motive, it has still failed to explain why punishing motive is impermissible. A recent case from the U.S. Supreme Court would seem to indicate that the majority is in error. In *Dawson v. Delaware*, 90-6704, slip. op. at 5 (U.S. Supreme Court March 9, 1992), the United States Supreme Court held that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Although under the facts of *Dawson* the Court concluded that there was a First Amendment violation, its analysis lends considerable support to the conclusion that considering the perpetrator's motivations in determining the appropriate sentence is permissible. For example, in concluding that evidence that the defendant belonged to the Aryan Brotherhood was impermissibly submitted during the penalty phase of a capital case in violation of the First Amendment, the court stated:

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war,' were related

> to the murder of a white hitchhiker. *See* 463 U.S., at 942-944 (plurality opinion). We concluded that it was most proper for the sentencing judge to 'tak[e] into account the *elements of racial hatred in this murder*.' *Id.*, at 949. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing. *Dawson v. Delaware*, 90-6704, slip. op. at 6-7 (U.S. Supreme Court March 9, 1992) (Emphasis added.)

The U.S. Supreme Court is clearly indicating that when racial hatred is relevant to the crime, i.e., the racial hatred is the perpetrator's reason for committing the crime, this information is completely relevant in sentencing. How then can the majority suggest that punishing motive is impermissible?

I repeat. Section 939.645, Stats., is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection, but rather anytime the choice of a victim from a protected class is shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

The penalty enhancer statute also does not seek to punish the motive of a perpetrator. Neither a perpetrator's bigoted beliefs, nor his or her motivation for intentionally selecting a victim because of a protected status are punished. Again, it is the act of selecting a victim because of his or her race, color, or etc., that is proscribed. If a perpetrator seeks out a Jewish person to physically assault, his intent is not just to injure, but to injure a Jewish person. He may be motivated by a hatred of Jewish people, a calling from God to sacrifice a Jewish person, or some other irrational motive. This law does not look to motive. This law does not look at why the perpetrator sought out a Jewish person. It looks only to

whether the fact that the victim was Jewish was a substantial factor in the defendant's purposeful choice of the victim.

Similarly, under the facts of the present case, even if Mitchell could show that his motive was not a hatred of whites, his conduct would still be punishable under the statute. As the State points out, Mitchell's motive could have been to impress the group of boys that accompanied him. Nevertheless, the statute would still apply. Its focus is not on bigoted or hateful motivations. Rather, it punishes the action of intentionally selecting a victim on the basis of a protected status listed in the statute. As Mitchell himself emphasized at oral arguments, the term "hate crimes" statute is a misnomer. The crimes that fall under the statute may be motivated by many emotions; the intentional selection is what is prohibited. The statute looks at intent, and statutes are used in many ways to punish crimes differently based on the perceived seriousness of the intent of the perpetrator. For example, an intent to kill is punished greater than an intent showing utter disregard for human life. Likewise, a reckless intent is punished less than an intent showing utter disregard for human life.

Section 939.645, Stats., does not attempt to prohibit or punish bigotry, antisemitism, or the like. It does attempt to limit their effects. An individual's freedom to express his or her views in writing, speech, or otherwise is not regulated or chilled by this statute. What is prohibited is the act of intentionally selecting victims because of their protected status. Why a Black or a Jewish person or any other person of a protected class was chosen as the victim is not relevant. What is relevant is that the victim is intentionally chosen because of the victim's protected status.

I conclude that sec. 939.645, Stats., legitimately regulates criminal conduct, and raises no issue under the First Amendment. It does not punish speech, thought, or

even motivation, nor does it sweep within its ambit actions which are constitutionally protected as to render it unconstitutionally overbroad.

II.

It is necessary to discuss the vagueness and equal protection issues, even though they are not reached by the majority. These issues are raised by Mitchell. I therefore take this opportunity to address each issue.

Mitchell asserts that this legislative attempt to alleviate bias related crime is unconstitutionally vague. Specifically he contends that the phrases "intentionally selects," "because of," and "race," are vague, undefined, and ambiguous. Thus, he argues that, they lead to erratic convictions and unfair prosecutions. I disagree.

A statute is "unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions." *Milwaukee v. Wilson*, 96 Wis. 2d at 16 (footnote omitted). This court has repeatedly indicated that "[t]he principles underlying the void for vagueness doctrine . . . stem from concepts of procedural due process." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983).

To determine whether a statute survives a vagueness challenge, this court has applied a two-part analysis. First, the statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law adequate notice of the proscribed conduct. Second, the statute must provide adequate standards for those who enforce the laws and adjudicate guilt. *See State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989) (citing *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989)). "However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis. 2d 266, 272,

400 N.W.2d 42 (Ct. App. 1986). Furthermore, to survive a vagueness challenge it is not necessary, "for a law to attain the precision of mathematics or science . . .." *Milwaukee v. Wilson*, 96 Wis. 2d at 16. This court has summarized its analysis under a vagueness challenge as follows:

> Thus it is not sufficient to void a criminal statute or regulation to show merely that the boundaries of the area of proscribed conduct are somewhat hazy, that what is clearly lawful shades into what is clearly unlawful by degree, or that there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease. Before a statute or rule may be invalidated for vagueness, there must appear some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule. *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

Mitchell's first contention is that the failure of the statute to define the phrase "intentionally selects" renders the statute unconstitutionally vague because it is not a term easily understood by ordinary persons who wish to abide by the law, and fails to provide adequate standards for enforcers of its provisions. I disagree. I conclude that the phrase "intentionally selects" is sufficiently definite to provide notice of prohibited conduct to persons of ordinary intelligence who wish to abide by the law and adequate standards for those who enforce the laws and adjudicate guilt.

The word "intentionally" is a word that is easily understood. "Intentionally" means a purpose to do the thing or cause the result specified. Lay persons of ordinary

intelligence do not need to scurry to their dictionaries in order to understand the meaning of this well recognized and easily understood word.

Nor is this a word that is a stranger to law enforcement officials, judges, and juries. "Intentionally" is defined in the criminal code at sec. 939.23(3), Stats.:

> 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'.

The Wisconsin statutes, particularly criminal statutes, are replete with references to "intentional" acts, or acts or conduct done "intentionally." *See, e.g.*, sec. 939.051(b), Stats. (whoever intentionally aids and abets the commission of a crime may be charged as a principal); sec. 939.48 (person is privileged to threaten or intentionally use force against another for the purpose of self defense); sec. 940.07 ("[w]hoever knowing the vicious propensities of any animal intentionally allows it to go at large . . .."); *see also* secs. 7.37(5), 19.58, 12.13, 26.05(3)(b), 26.14(8) and 20.927(4)). Unquestionably, law enforcement officials, judges, and juries are quite capable of applying the word to varied situations in the resolution of a legal case.

Likewise, the word "selects" is well understood and easily defined. "Select" means "to choose from a number or group . . . by fitness, excellence, or other distinguishing feature. . .." Webster's Third New International Dictionary 2058 (1961). As the court of appeals concluded, the meaning of the phrase "intentionally selects" is easily discerned. It means to purposely choose or pick out. I conclude that the phrase "intentionally selects" is sufficiently clear to persons of ordinary intelligence to

afford a practical guide for law-abiding behavior and is capable of application by those responsible for enforcing the law.

In the court of appeals, Mitchell appeared to make an alternative vagueness argument with respect to the phrase "intentionally selects." The court of appeals explained his argument as follows:

> Assuming that 'intentionally selects' means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term 'intentionally selects' is this: Any time an accused is a different race than the alleged victim, it can be viewed as a 'hate crime' suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was 'intentionally selected.' Therefore, Mitchell argues that so long as the accused 'knows' the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines. *State v. Mitchell*, 163 Wis. 2d 652, 661-62, 473 N.W.2d 1 (Ct. App. 1991).

Although Mitchell does not appear to have abandoned this argument, he seems to have framed it in slightly different terms. Mitchell now appears to argue that the statute is vague because it does not indicate to what extent a victim's protected status must affect the perpetrator's selection decision in order to implicate the statute. In other words, he argues that because the meaning of the phrase "because of" is vague and not ascertainable by an ordinary person, a fair application of the statute is impossible, and it will

likely be applied any time an accused is a different race than the victim. I do not agree.

I agree with the court of appeals that the operative terms in the statute are not whether the victim is of a different "color" or "race," or other protected status. Rather, the operative terms are whether the victim was "intentionally selected" or purposely picked out "because of" the victims race, color, etc. "If a victim is of a different race . . . than the perpetrator, that fact alone will not allow the penalty enhancer to be used." *Mitchell*, 163 Wis. 2d at 662. What is important is whether the perpetrator picked out the victim because of his or her race. The key is the "intentional selection because of" the victims protected status.

I reject Mitchell's contention that the language "intentionally selects because of" fails to define with sufficient specificity the conduct which is proscribed. I again emphasize that "'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ..'" *Bachowski*, 139 Wis. 2d at 410. (citing *Roth v. United States*, 354 U.S. 476, 491 (1957)). Giving the phrase "because of" its ordinary commonsense meaning, *see State v. Whittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, measured by common understandings and practices, I conclude that where a victim's protected status is a substantial factor in the perpetrator's selection decision, the enhancement statute applies.

It is unreasonable to construe "because of" to mean that the statute applies where race, color, or the like is only a minor or de minimis factor in the perpetrator's selection decision. Such a construction in light of the legislature's rationale (see Section III below) would be absurd. Nor would it be reasonable to construe the phrase to mean that the statute applies only when race, color, or the like is the

sole factor in the perpetrator's selection decision. Legislatures realize that seldom, if ever, do people act based on one factor or consideration. Rather, people's conduct is largely driven by a multitude of factors which have varying impacts on their decisions. A reasonable reading of the statute is that it creates liability where "but for" the victim's protected status, the perpetrator would not have selected the victim for the crime. Thus, I conclude the victim's status must be a substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim.

I therefore conclude that the legislature's use of the words "because of," in sec. 939.645, Stats., although perhaps not as precisely drafted as possible, conveys "sufficiently definite warning as to the proscribed conduct" to withstand a vagueness challenge. Furthermore, Mitchell's conduct plainly falls within the prohibited zone of the statute, as there is no doubt that Gregory Reddick's race was a substantial factor in Mitchell's selection of him as his victim.[4]

Mitchell also contends that the word "race" is vague and ambiguous. I agree with the State that it is difficult to determine the basis of defendant's argument in this regard.

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[4]The defendant has waived any challenge he might have had to the propriety of the jury instruction given in this case. However, even if it were not waived, the defendant would be hard pressed to show that the instruction given in this case caused him harm. The instruction in this case indicated that in order for the jury to conclude that the defendant intentionally selected the victim because of his race they must conclude "that the defendant knew that Gregory Reddick was a member of the white race and committed the crime of aggravated battery against him for the reason that he was a member of that race." While this instruction may have given the jury the impression that the victim's race had to be the sole factor in the defendant's selection decision, it certainly did not give the impression that a finding that race was anything less than a substantial factor would trigger the penalty enhancer statute.

I construe Mitchell's argument, as did the court of appeals, to be that persons of ordinary intelligence do not know the difference between the terms "race" and "color." This argument has no merit.

I find it difficult to believe that persons of ordinary intelligence would not understand what the word "race" means. Furthermore, even if there were difficulty understanding the literal difference in the terms "race" and "color," both are terms covered in the statute. Selection because of race or color is prohibited by the statute. Therefore, if people of ordinary intelligence understand the general parameters of either term, they have fair notice of the conduct that is prohibited.

Mitchell also suggests that the statute is unconstitutional because law enforcement authorities, judges, and juries may or may not pursue penalty enhancement under the statute based on their own prejudices or views toward the race, or religion, etc., of the victim or the defendant. I understand Mitchell's argument to be a constitutional challenge based on vagueness, i.e., because the statute is vague, law enforcement officials will use their own prejudices to apply the statute. This argument is meritless.

As I concluded above, the statute is sufficiently clear to persons of ordinary intelligence to provide adequate standards for those who enforce the laws, such that they will not be relegated to creating their own standards. The law enforcement responsibility to determine whether the conduct proscribed by the penalty enhancement statute can be proven in a particular case is no more difficult than similar determinations routinely made by officials in enforcing the law. Furthermore, the potential for improper jury bias and prosecutorial abuses is present in many cases. Safeguards exist to protect against these abuses. For example, this court has reviewed prosecutorial charging decisions to determine if there has been an abuse of discretion or discriminatory prosecution. *See State v.*

Karpinski, 92 Wis. 2d 599, 609, 285 N.W.2d 729 (1979). This court has held that a prosecutor's decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Sears v. State*, 94 Wis. 2d 128, 134, 287 N.W.2d 785 (1980). Thus, discriminatory abuses can be dealt with through other law; its potential does not render a statute vague.

The last contention made by Mitchell concerning vagueness is that the statute does not provide standards to help law enforcement determine what evidence can be used to prove a violation of the statute. A statute does not have to dictate rules in regard to admissibility of evidence. Just as in any other case, the Wisconsin Rules of Evidence provide a comprehensive guide for law enforcement. Hypothetical speculation as to how far back into a person's life a prosecutor can delve to prove the prohibited conduct of intentional selection does not render the statute unconstitutional. The rules of evidence which deal with relevancy provide adequate standards to guide law enforcement in determining the appropriate nexus between evidence and alleged misconduct, such that the evidence is admissible. *See* Wisconsin Rules of Evidence 904.01, 904.02, and 904.03.

I conclude that the legislature has defined the conduct proscribed by sec. 939.645, Stats., with sufficient specificity to meet constitutional requirements with respect to vagueness. The law is clear in its terms and its meaning. When the victim's protected status (i.e., race, religion, etc.) is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative.

III.

Lastly, I discuss Mitchell's equal protection challenge. In *McManus*, 152 Wis. 2d at 130-31, this court summarized the law with respect to equal protection:

> Equal protection . . . requires that there exist a reasonable and practical grounds [sic] for the classifications drawn by the legislature. . . . Equal protection does not deny a state the power to treat persons within its jurisdiction differently; rather, the state retains broad discretion to create classifications so long as the classifications have a reasonable basis. The fact a statutory classification results in some inequity, however, does not provide sufficient grounds for invalidating a legislative enactment. (Citations omitted).[5]

If the statute in question does not impinge on a fundamental right or create a classification based on a suspect criterion, the legislative enactment "'must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest.'" *Id.* (citation omitted). "If the classification is reasonable and practical in relation to the objective, that is sufficient and doubts must be resolved in favor of the reasonableness

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[5]The Equal Protection Clause of the United States Constitution provides:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, United States Constitution.

The Equal Protection Clause of the Wisconsin Constitution Provides:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness . . . . Article I, Section 1, Wisconsin Constitution.

This court has held that the equal protection clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution. *See State ex rel. Cresci v. H&SS Department*, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974).

of the classification." *State v. Jackman*, 60 Wis. 2d 700, 705-06, 211 N.W.2d 480 (1973). I examine sec. 939.645, Stats., under a rational basis test. The present case does not impinge on a fundamental right or create a classification based on a suspect criterion.

Section 939.645, Stats., is violated when the victim's protected status is a substantial factor in the defendant's purposeful choice of a victim for certain crimes. When such intentional selection on account of status is proved, penalties in addition to the underlying crime are assessed. I perceive this legislation to be a legislative judgment that crimes involving intentional selection of a victim because of the victim's status cause greater harm to victims and to the public than do crimes in which status is not a factor. Because of this, the legislature has chosen to punish these intentional selection crimes more severely than conviction of the underlying crime would otherwise require.

Regulation of harmful conduct is a legitimate exercise of a state's power. The function of the legislature in drafting criminal laws is always to make reasoned decisions concerning the social harm of particular conduct. The criminal laws are replete with similar legislative judgments involving enhanced penalties. For example, sec. 939.63, Stats., increases the penalty for a crime if the person possesses, uses, or threatens to use a dangerous weapon. Similarly, if a person commits a crime while his or her identity is concealed, the penalty for the underlying crime may be increased under sec. 939.641. *See also*, sec. 939.62 (increased penalty for habitual criminality); sec. 939.621 (increased penalty for certain domestic abuse offenses); sec. 939.64 (increased penalty for committing a felony while wearing a bullet-proof garment); sec. 948.02 (sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of Class B felony, while sexual contact or intercourse with a person who has not attained the age of 16 is a Class C felony); sec. 940.31 (kidnapping, a Class B felony under the statute is enhanced to a Class A felony when it is committed with the

intent "to cause another to transfer property in order to obtain the release of the victim").

There is ample evidence to support the legislature's conclusion that intentional selection of a victim from a protected class causes a greater harm to its victims as well as to society than do crimes where the victim's status is not a factor. Many commentators have discussed the widespread psychological harms caused by crimes that appear to be bias related. *See generally*, Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Developments in the Law Sexual Orientation and the Law, 102 Harvard L. Rev. 1508, 1541 (1989). These theorists posit that bias related crimes cause injury and damage far beyond that created by similar criminal conduct which does not appear to be bias related because of their tendency to perpetuate prejudice and victimize classes of people. *See generally*, Gellman, supra at 340. Crimes that appear to be based on intentional selection because of the victim's status create fear not only among those who share the victim's race, color, religion, etc; but they also threaten society in general. Reports of intentional selection, even if perhaps not motivated by bigotry, create the appearance of bigotry and hatred. These crimes breed fear, misunderstanding, misconceptions, and isolation between different classes of people. The Wisconsin legislature has attempted to hinder these crimes, not by regulating speech, thought, or even motivation, but rather by enhancing the criminal penalty for any crime, however motivated, where the perpetrator purposefully selects a victim because of a protected status. I conclude that the legislature's action was eminently reasonable and does not violate principles of equal protection.

Mitchell posits an additional equal protection challenge to sec. 939.645, Stats. Mitchell argues that because sec. 939.645 applies only to crimes listed in the Criminal Code,

chs. 939-948, and not to other crimes found in the Wisconsin statutes, it violates equal protection. Mitchell contends that this differentiation creates a classification based on suspect criterion which violates equal protection for three reasons: (1) the statute discriminates against the poor and uneducated because they are most frequently accused of the crimes listed in chs. 939-948, and in contrast "white collar" criminals are exempt from the penalty enhancement because they commit the crimes found outside these chapters; (2) treating crimes proscribed under chs. 939-948 differently from other crimes is unreasonable because some crimes found outside chs. 939-948 are more serious than those found in chs. 939-948; (3) it is unreasonable to exclude certain crimes, such as illegal restraints of trade, hunting violations, motor vehicle violations, consumer fraud, drugs and narcotics, etc., found outside chs. 939-948 from the penalty enhancement provision. Mitchell's arguments are without merit.

Section 939.645, Stats., singles out no particular group for different treatment, and thus no suspect classification is involved. As the State points out, there simply is no "white collar/poor people" distinction found in sec. 939.645. Mitchell has offered no evidence to support his theory that poor or minorities are the groups usually accused of committing crimes under chs. 939-948. Furthermore, several crimes listed in the Criminal Code involve what are traditionally viewed as "white collar" crimes. *See, e.g.*, sec. 943.70, (theft of trade secrets); sec. 943.38 (forgery); sec. 943.70 (computer crimes); and sec. 946.12 (misconduct in public office). Likewise, crimes that are not traditionally viewed as "white collar" crimes are found outside chs. 939-948. *See, e.g.*, ch. 161 which covers drug offenses. The dichotomy which Mitchell seeks to establish does not exist and his argument is without merit.

Mitchell's second argument is also without merit. Mitchell contends that the classification is not proper because some crimes found outside chs. 939-948, Stats.,

are more serious than crimes in the Criminal Code. Even if, as Mitchell suggests, some crimes outside chs. 939-948 pose more serious harms, equal protection does not require legislatures to order "evils hierarchically according to their magnitude and to legislate against the greater before the lesser." *U.S. v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987), *cert denied*, 481 U.S. 1057 (1987).

Lastly, Mitchell claims it is irrational to exclude certain crimes from the penalty enhancer statute. Mitchell points to crimes such as hunting violations and motor vehicle violations and argues that these crimes may be committed against specially selected victims just as those covered by the enhancer. However, as the State notes, this assertion is also meritless because although the harm is undeniable when victims are singled out for non-criminal code crimes, the legislature is not required to legislate against all harms. *See McDonald v. Board of Election*, 394 U.S. 802, 809 (1969). Therefore no equal protection violation exists.

The State offers two further explanations for why the legislature chose to apply sec. 939.645, Stats., only to crimes grouped in the criminal code chs. 939-948. First, the crimes which are most likely to involve bias related victim selection are listed in the Criminal Code. For example, battery, homicide, and criminal damage to property are listed in the Criminal Code. Second, by limiting application of the penalty enhancer to the Criminal Code, the legislature was able to quickly identify with certainty the majority of offenses which are most appropriate for penalty enhancement. The limiting application "avoided the cumbersome task of examining the multitude of crimes found outside the criminal code for possible unanticipated and undesired results." I find these explanations rational and practical in light of the purpose behind sec. 939.645 of preventing and deterring bias related crime.

IV.

In conclusion, no one disagrees with the majority's statement that "punishment of one's thought, however repugnant the thought, is unconstitutional." The majority misses the point entirely. Of course the Constitution protects bigoted and hateful thoughts, but it does not lend its protection to the person who harbors such thoughts and then *acts* on them. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination in the distribution of publicly available goods, [and] services . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, . . . are entitled to no constitutional protection"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("'[i]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protections.' . . . There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("'the constitution places no value on discrimination', . . . and while '[i]nvidious private discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'"). Is it the majority's conclusion that it is permissible to act on bigoted beliefs?

I conclude that the penalty enhancer statute is neither vague nor overbroad. I further conclude that the statute does not violate principles of equal protection. Accordingly, I dissent.

153 Wis. 2d 652
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL, Defendant-Appellant,
No. 90-2474-CR.
Court of Appeals

Submitted on briefs April 29, 1991.
Decided June 5, 1991.

(Also reported in 473 N.W.2d 1.)

APPEAL from judgments and an order of the circuit court for Kenosha county: JEROLD W. BREITENBACH, Judge. *Affirmed.*

On behalf of the defendant-appellant, the cause was submitted on the brief of *Bernard Goldstein of Goldstein & Kagen* of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of *James E. Doyle*, attorney general, and *Paul Lundsten*, assistant attorney general.

Before Nettesheim, P.J., Brown and Anderson, JJ.

BROWN, J. Todd Mitchell challenges the constitutionality of the "hate crimes" penalty enhancer law in Wisconsin, sec. 939.645, Stats., claiming that it is vague and overbroad and violates equal protection principles. We hold that the statute clearly gives persons of ordinary intelligence fair notice of the conduct prohibited, provides standards for those who enforce the laws, and does not "chill" citizens from exercising protected constitutional freedoms. Thus, the statute is neither vague nor overbroad. We will not reach the equal protection issues

because of waiver. We also discuss other nonconstitutional issues and affirm.

Gregory Reddick, a fourteen-year-old white male, was walking down a street near the Renault apartment building in Kenosha. He was wearing "British Knights" brand athletic shoes. Several black males rushed across the street at Reddick, knocked him to the ground, surrounded him, and beat him until he was unconscious. Police found him a short time later, still unconscious, and with his shoes missing. Reddick was severely injured; he was comatose for about four days; and his injuries might have been fatal had he not received medical treatment.

Testimony revealed the following facts about the beating and theft. A group of young black men and boys were gathered at the Renault apartment building on the evening of the incident. Mitchell, who was nineteen at the time, was one of the older members of the group. Some of the group were inside the apartment complex discussing the movie "Mississippi Burning;" in particular, they were talking about that part of the movie where a white man beat a young black boy who was praying. There was no evidence that Mitchell was involved in this discussion.

About ten members of the group that was inside moved outdoors. There, people were talking about the movie. Before the victim appeared, Mitchell said to the gathering, "Do you all feel hyped up to move on some white people?"

A short time later, Reddick approached on the other side of the street. Reddick said nothing provocative. Mitchell said, "You all want to fuck somebody up?" Then he said, "There goes a white boy; go get him." He counted to three and pointed this way and that way, indicating that the group should surround Reddick.

Several persons in the group immediately took off running toward the white youth. Most ran directly at him. One person in the group kicked Reddick, knocking him to

the ground. Several attackers then surrounded Reddick and repeatedly stomped, kicked and punched him. This lasted about five minutes. One of the attackers said he thought Reddick was dead.

One of the attackers returned from the beating possessing Reddick's "British Knights" shoes. He showed them to different people. Mitchell was in the area when the shoes were being shown.

Mitchell was convicted of aggravated battery, party to a crime, and the jury separately found that Mitchell intentionally selected the battery victim because of the victim's race, pursuant to sec. 939.645, Stats. Mitchell was also convicted of theft, party to a crime.

Mitchell's major challenge is to the constitutionality of sec. 939.645, Stats., dubbed the "hate crimes" statute. The constitutionality of a statute is a question of law which this court may review without deference to the trial court. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 733, 416 N.W.2d 883, 892 (1987). Here, there is not even a trial court opinion to review, as the constitutionality issues are raised for the first time on appeal. Nonetheless, challenges to the facial constitutionality of statutes are a matter of subject matter jurisdiction and, therefore, cannot be waived. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 536-39, 280 N.W.2d 316, 320-21 (Ct. App. 1979). The equal protection argument, however, is not a challenge to a facial constitutionality of the statute. We deem this specific argument waived and we will not address it.

Before addressing Mitchell's vagueness and overbreadth challenges to sec. 939.645, Stats., we briefly touch upon the burden he must carry. Generally, when a defendant challenges the constitutionality of a statute, he or she bears the heavy burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Dums*, 149 Wis. 2d 314, 319-20, 440 N.W.2d 814, 815-16 (Ct. App. 1989). The defendant must do this in

light of the strong presumption favoring the constitutionality of the statute. *State v. Hurd*, 135 Wis. 2d 266, 271, 400 N.W.2d 42, 44 (Ct. App. 1986).

There is an exception to that rule. When a statute infringes on the exercise of first amendment rights, the burden of establishing its constitutionality is on its proponent. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Mitchell claims that the statute punishes activities protected by the first amendment. He therefore argues that the state has the burden in this case. For the reasons that follow, we disagree and impose the burden on Mitchell himself.

We first discuss the vagueness argument. Section 939.645, Stats., provides an increase in penalties for any person committing a crime under chs. 939 to 948, Stats., who, in addition:

> *Intentionally selects* the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the *race*, religion, *color*, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Section 939.645(1)(b), Stats. (emphasis added).

Mitchell points to two terms in the statute, "intentionally selects" and "race" as being undefined and ambiguous. He claims two consequences result. First, that the statute fails to give proper notice of prohibited conduct. Second, that the statute encourages arbitrary or erratic convictions because there are no guidelines for prosecutors or police.

Mitchell's claims track the two-step process in determining vagueness claims. The steps are: (1) the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair

notice of the conduct required or prohibited; and (2) the statute must provide standards for those who enforce the laws and adjudicate guilt. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654, 662 (1989).

A legal principle to be kept in mind when analyzing a statute for vagueness is that the statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Hurd*, 135 Wis. 2d at 272, 400 N.W.2d at 45. For the statute to be unconstitutional, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714, 719 (1976).

It should be further noted that a defendant who plainly falls within the prohibited zone of a statute cannot mount a vagueness challenge by building a case for some hypothetical person who might lie outside the zone. *See id.* at 713, 247 N.W.2d at 719.

The first claim is that the terms "intentionally selects" and "race" are not defined in the statute and are incapable of clear understanding by an ordinary person. We do not agree. The word "intentionally" is defined in the criminal code. Section 939.23(3), Stats., states in pertinent part:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Thus, the word "intentionally" means a purpose to do the things specified. It is easily defined.

The word "selects" is also easily defined. We find it difficult to believe that persons of ordinary intelligence would not understand what this word means. Even so, when undefined, nontechnical words are used in a statute, they are given their ordinary and accepted meaning which may be ascertained from a recognized dictionary. *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, 651 (1984). Webster defines "select" as "to take by preference from a number or group: pick out." *Webster's New Collegiate Dictionary* 1047 (1977). Therefore, the term "intentionally selects" means to purposely pick out.

Mitchell also argues that the word "race" is ambiguous. We construe his argument here to be that persons of ordinary intelligence do not know the difference between the term "race" and "color," another term used in the statute. We do not need to resort to a recognized dictionary to resolve this claim. Reddick was white and is of a different race and color than the attackers. The statute prohibits purposely picking out a person of race or color. Under either term, the law was violated. We do not understand, and Mitchell does not enlighten us, how he has standing to raise this particular argument since his conduct plainly falls within the prohibited zone of the statute regardless of the literary difference between the terms "race" and "color." This issue is meritless and we discuss it no further.

Having determined that the term "intentionally selects" is easily defined, we turn to what we consider to be Mitchell's major argument regarding vagueness. Assuming that "intentionally selects" means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term "intentionally selects" is this: Any time an accused is a different race than the alleged victim, it can be viewed as a "hate crime" suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other

reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was "intentionally selected." Therefore, Mitchell argues that so long as the accused "knows" the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines.

We disagree. The operative term in the statute is not whether a person "intentionally selects" a victim. Most, if not all, criminals can be said to "intentionally select" their victims. Nor is the operative term whether that victim who is intentionally selected is of a different "race" or "color," for instance. The operative term is "because." If a person is selected *because* of race, color, disability, and the like, then the statute becomes operative. If a victim is of a different race, for instance, than the perpetrator, that fact alone will not allow the penalty enhancer to be used. Nor will it be enough that the perpetrator "picked out" or "selected" a person of a different race. The key is whether the selection was *on account of* race. If there is proof of that, then the enhancer becomes operative.

Thus, the statute is not vague on its face. People of ordinary intelligence can read the statute and determine that if they intentionally select a victim who happens to be of a different race, for example, they will not be subject to an enhancer. However, if they select that victim *because of* race, they will be subject to it. This also provides a proper standard for prosecutors and police. They must have some evidence that the victim was selected because of race. The vagueness argument fails.

We next discuss overbreadth. A statute may be constitutionally overbroad if it intrudes on a substantial amount of constitutionally protected activity. Our supreme court explained overbreadth as follows:

> A statue [sic] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski v. Salamone, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987) (citations omitted).

Unlike a vagueness argument, an overbreadth challenge may include hypothetical speculation. Therefore, even if no "chilling effect" was present in the defendant's particular case, a defendant may still argue that the statute is overbroad because it chills the rights of others. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452, 457-58 (1980). This is true when the alleged overbreadth implicates free speech rights. *See id.*

We agree with the state that Mitchell's overbreadth argument is "hard to follow." He appears to assert that the statute is overbroad because it punishes free speech. He seems to argue that slurs, epithets, derogatory and racial expressions are simply part of everyday human behavior and are protected free speech when not involved in the commission of a crime. He apparently argues that there is no good reason why this same free speech should not also be protected during the commission of a crime. He seems to reason that the statute is criminalizing speech just because the perpetrator exercises his or her freedom of speech at the same time as the commission of a crime. By allowing the state to use the defendant's verbal statements against him, the state thereby discourages free speech.

We disagree that there is an infirmity in the statute on overbreadth grounds. The statute is directed at the action of selecting a victim and not at speech. Section 939.645, Stats., does not impede or punish the right of persons to

express themselves regarding race or any other status or group listed. Words, or even beliefs, are not punished here. What *is* punished is conduct. The words used by a defendant are merely circumstantial evidence that the defendant specially selected the victim because of race or for other reasons listed. *Cf. People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988).

Thus, evidence of the words uttered by a defendant are used no differently than they are in other criminal statutes. The words are simply probative as to an element of a crime. Here, Mitchell's words were evidence that he intentionally selected Reddick because of race. That is why Mitchell has the burden of proof in this case instead of the state. The statute does not proscribe free speech. It is not a law limiting the time, place or manner of speech. It is a law proscribing certain conduct where words can be used as circumstantial evidence of such conduct.

Mitchell next asserts that his conviction for aiding and abetting the theft of the victim's shoes is not supported by the record. Primarily, he argues that there was no evidence showing his intent to commit a theft or participate in a theft. In particular, he reasons that, although the jury may infer that he incited a battery, they may not infer that he intended to encourage a theft. He asserts that the person who stole the shoes did so on his own and without any encouragement or aid from Mitchell.

We do not agree. The jury had evidence from which it could infer that Mitchell encouraged and directed people to "move on" and "fuck up" the victim. We agree with the state that this encouragement was general and not limited to inflicting injury. By encouraging and directing the persons who attacked, Mitchell assisted the criminal mischief. The resultant beating, leaving the victim incapacitated, was one natural and probable consequence of the encouragement. The theft of the shoes was another. Although Mitchell raises other arguments about the theft conviction, they are all variations of the same theme--that

the encouragement was for the purposes of battery and must be separated from any act of theft since Mitchell did not intend for a theft to take place. However, we hold that the theft is a natural and probable consequence of his incitement, just as was the battery.[1]

By the Court.--Judgments and order affirmed.

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[1]One of Mitchell's arguments is that the trial court never instructed on the "natural and probable consequences." The record indicates that there was such an instruction given.

STATE OF WISCONSIN
CIRCUIT COURT KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. DECISION & ORDER

TODD MITCHELL, File 89-CF-434

Defendant.

The defendant by his attorney, Bernard Goldstein, has moved the court for an order granting the defendant post-conviction relief. The plaintiff appeared at the time of hearing in this matter by Assistant District Attorney and the defendant appear by Attorney Goldstein. After consideration of the record, argument of counsel and the controlling law, the court renders the following

DECISION

The defendant reiterates the contention that Section 939.645, Stats., is unconstitutional. The court has previously decided this motion on the record. There is no argument presented which would change the holding of the court that the statute is constitutionally permissible. The statute does not require that the victim and perpetrator be of different races, religion, color, disability, sexual orientation or national origin as argued by the defendant's brief on the issue as filed by the trial court. It is regrettable that the defendant here is of a minority race that the law was intended to protect. But, that does not make the statute unconstitutional.

The defendant next maintains that there is no credible evidence in the trial record establishing that defendant was a principal or party to the crime of theft from a person. The defendant maintains that he must have done some act as a principal or party to a crime in direct furtherance or commission of that crime.

The court finds that one who intentionally aids and abets the commission of a crime is responsible not only for the intended crime, if it is in fact committed, but as well for other crimes which are committed as a natural and probable consequence of the intended criminal acts. *State v. Asfoor*, 75 Wis.2d 411, 249 N.W.2d 529 (19770, *State v. Cydzik*, 60 Wis.2d 683, 211 N.W.2d 421 (1973) and *State v. Stanton*, 106 Wis.2d 172, 316 N.W.2d 134 (Ct. App. 1981). The jury was instructed and found by their verdict that the crime of theft from the person was a natural and probable consequence of the intended acts. Certainly, that finding by the jury is not beyond the general experience of the court. It is not unreasonable to expect that a "mugging" will include the taking of property from the person mugged. The court finds and concludes that the acts constituting the criminal charge as contained in Count Two of the information are the natural and probable consequences of the acts intended against the victim.

The defendant maintains that a verdict was not submitted to have the jury answer with a "not guilty" to the lesser included offense. The jury found the defendant guilty of the lesser included offense. A verdict was submitted which provided the jury the opportunity to find the defendant not guilty of the greater charge of aggravated battery as was alleged in Count One of the information. The usual practice of the court was not followed in this case. The court does usually provide a more general type of "not guilty" verdict. However, the court finds that the form of the verdicts are correct and that the jury unanimously agreed upon their verdict. The jury only returned one completed verdict. The court finds that polling of the jury revealed no question on the intent

of the jury. The defendant provides no law which would require the court to grant a new trial on this basis. The court finds no merit in the contention that the jury was misled or did not have the appropriate alternatives in the forms of the verdict.

The defendant next maintains that the defendant was entitled to instructions for included crimes, namely, disorderly conduct, simple battery and solicitation of a crime. Under § 939.66, Stats. the defendant maybe convicted of an included crime. The defendant was convicted of an included offense, intermediate battery. Disorderly conduct is a crime which requires proof of in addition to those which must be proved for the crime of aggravated battery as charged and is, therefore, not an included crime. The court reject the included offense of simple battery in that there is no reasonable basis in the evidence for acquittal of aggravated battery and conviction of simple battery. The victim was very seriously injured and there was no reasonable theory at the time of the jury trial or now which would lead one to convict the defendant of simple battery and acquit him of aggravated battery. The defendant was convicted of a Class "E" felony with an enhancer provision. The defendant's counsel is no asking that the court should have submitted a Class "D" felony which carries a greater penalty. Certainly, the defendant is not prejudiced by not having had the jury consider a greater penalty crime than that for which they found him guilty. There is no reason to grant any relief on this ground.

The defendant requests a new trial on theory that the jury instruction on being party to the crime should have been given separately as to each of the offenses. The record reflects that no emphasis connected the party to a crime instruction and either count of the information. There is no showing that the jury would in any way be confused by the lack of re-reading the party to the crime instruction as to each count of the information. The court

finds no reason to grant a new trial on the basis of the party to the crime instruction as given.

A new trial is requested by the defendant on the ground that the jury instructions as read to the jury contain prejudicial errors. The first error alleged is that the court read the information as it contains the penalty citation for a felony. The number as read to the jury corresponds to a conviction for aggravated battery and theft from a person. There is no showing of prejudice, mistake or confusion by the use of the felony penalty section. There is no merit to this contention.

The next alleged prejudicial error is that the court instructed on parties to a crime and included being party to a conspiracy with another. The defendant was charged with violating § 939.05, Stats., as to both counts of the information. Under that section a person is concerned with the commission of a crime if he or she conspires with another to commit the crime. The instruction was correct and there is no merit to the contention that such instruction was prejudicial error.

The next cited error was including the party to the crime instruction as it concerned the theft from a person charge in Count Two of the information. The court finds that the jury did decide that the theft of the shoes of the victim was a natural an probable consequence of the intended crime. Again, there is no merit to this alleged error in the instructions.

The next ground for a new trial is that the court used defendant where the wording should have been principal. The defendant was not prejudiced by such wording. Such wording taken alone without being aware of the entire instruction would be to the benefit of the defendant because the jury would have been required to find that the defendant was the principal and directly committed the crime. There is no merit to the defendant's position on this matter.

There is another contention that the instructions used the word principal and not defendant. The court determines that the jury is to first determine if the principal committed the offense and then determine if the defendant was concerned in the commission of the crime committed. The instruct was correct. Again, there is no merit to this contention.

The court takes the grounds for a new trial as alleged at 6.(i), (j) and (k) of the Motions for Post Conviction Relief and determines that the arguments are without merit. The instructions correctly stated the law for the jury.

The defendant next argues that the jury verdict as to the special question on the race of the victim was "inconsistent." The court believes that it could have instructed on the lesser included verdict as to the racial question. However, from a review of both verdicts it is clear that the jury knew they had the alternative of finding if the crime was racially motivated or not. The court finds that the jury was adequately instructed.

Finally, as to the last ground for a new trial based upon erroneous instructions, the court finds that the use of the word principal in the theft from a person instruction was correct. It is the jury's duty to first determine if the principal committed the crime and then to determine if the defendant was concerned in its commission.

The next contention is that the jury verdict on Count One should be answered by the court on the racial motivation question with a "no." The court finds that the jury was adequately instructed and found that there was evidence to find that the battery was racially motivated. The court finds that there was sufficient evidence in the record for the jury to make this determination and will deny any motion for relief on this issue.

The defendant seeks a new trial for the reason that the venue of the case was changed to Walworth County upon

a motion by the defendant for change of venue. The trial counsel for the defendant was afforded the opportunity to demonstrate the racial composition of Walworth County and any law that would require a change to a county that had a similar racial composition to that of Kenosha County. The defendant has failed to demonstrate that he has been deprived in any way of a fair trial by an unbiased jury.

The defendant's position in this matter starts with the premise that a juror of a different race is presumed to be prejudiced. The position then goes on to require that a change in venue of necessity should be to a county that has a substantial population of the minority of which a defendant is a member. The position would have the court ignore the reason for the change in venue, namely prejudicial pre-trial publicity. The court here was not concerned with race, but rather with the reason for change in venue. Even if the position of the defendant is adopted, he has failed to demonstrate that the population from which the jury was drawn in his case did not have representation of his race. In his motion he even admits that the panel did have at least one juror of the same as that of the defendant. He has also failed to demonstrate that the representation of his race on panel from which his jury was selected was any different than the racial composition of the population or panel in Kenosha County.

Voir dire was provided to the defendant to seek out any prejudicial juror. There was no motion prior to the selection of the jury in regard to the racial composition of the Walworth County jury panel. Now, upon reflection the defendant says that a reasonable number of blacks were not available for the jury panel. No evidence substantiates this position. No juror was asked their personal racial composition. Moreover, how does such composition differ from that of Kenosha County. The court has in another case identified the racial composition of Kenosha County as contained in the 1980 Census. The court is aware that the chances of obtaining a black juror on the original twenty

jurors selected is approximately one in two. That is one out of every two panels of twenty jurors in Kenosha County would have a black juror on it. There is no showing that the Walworth County jury panels differ from that probability ratio.

The defendant then requests a new trial for the reason that the court did not allow exhibits to go to the jury. He cites no specific piece of evidence that was not fully viewed and examined by the jury. The court cannot find that trial counsel ever requested that any exhibits be sent to the jury. The defendant cites no request by the jury to see any particular piece of evidence. There is no reason to believe that any exhibit had any particular significance in the defendant's trial. There is no merit to the request for a new trial on the ground that the jury did not have exhibits in the jury room. Certainly, it is error to send some exhibits to the jury, including the statement of a defendant.

The defendant next requests a new trial for the reason that the court improperly prevented trial counsel from adequately examining a witness named Atkins about the plea bargain he obtained in exchange for his testimony. The witness indicated that there was no plea agreement for his testimony. The Assistant District Attorney stated on the record that there was no agreement to give the witness any consideration on his charges for his testimony. The witness indicated that it was his third time that he had the opportunity to have a driving after revocation reduced to a charge of driving without a valid driver's license. The court allowed defense counsel to go into the charge of obstructing an officer which was another charge against the witness at the time of his witnessing the defendant. The nature of that charge of lying to a police officer was gone into before the jury.

The defendant's counsel asked to go into the witness's traffic record. Objection was made and a hearing was held outside the presence of the jury. The determination of the

previous criminal record was made. The court notes that trial counsel's offer of proof from the witness did not substantiate in fact the theory of counsel that the witness was given the consideration, including avoiding of habitual offender status, for his testimony. The offer of proof does not indicate what other questions that the defendant's trial counsel could have asked and were not allowed to be ask. The court finds no merit to the position of the defendant in this regard. Trial counsel argued that the witness obtained a "deal" and was able to argue that the witness had obstructed a police officer by lying. Trial counsel for the defendant also relied on the same witness's statements as they served to show the innocence of the defendant.

The defendant asks for a new trial on the ground that he was prejudiced by evidence relating to "gangs." The record shows that trial counsel for the defendant raised the idea of a gang activity. He asked the first question concerning gangs. Objection was made by the plaintiff as to the relevancy of the "gang" activity and defendant counsel continued with his pursuit of gang questions. The position of the defendant is without merit. It was the obvious strategy of defendant to put the idea of a gang before the jury. He cannot now complain that he prejudiced the jury.

The defendant seeks a new trial on the ground that the self-serving and conflicting testimony led to his conviction. The testimonies of the various witnesses are to some degree conflicting. Certainly, the statements of some of the witnesses are self-serving. However, it was for the jury to determine the credibility of the witnesses. The conflicts in the testimonies are easily reconcilable. There is no merit to this ground for a new trial.

The plaintiff is entitled to an order denying the defendant's motion for post-conviction relief.

ORDER

Based on the foregoing decision;

IT IS HEREBY ORDERED that the defendant's motion for post-conviction relief is denied.

Dated this 9th day of October, 1990.

BY THE COURT

JEROLD W. BREITENBACH
Circuit Judge

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin penalty enhancement statute:

> **939.645 Penalty; crimes committed against certain people or property. (1)** If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

> **(2)**(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> **(3)** This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> **(4)** This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wis. Stat. § 939.645 (1989–90).

Similar State Statutes

Cal. Penal Code §§ 190.2(a)(16), 422.75(a) (West Supp. 1992);

Colo. Rev. Stat. Ann. § 18-9-121 (West Supp. 1991);

Conn. Gen. Stat. Ann. § 53a-181b (West Supp. 1992);

Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd Supp. 1992);

Iowa Code Ann. § 729.5(3)-(4) (West Supp. 1992);

Md. Crim. Law Code Ann. § 470A(b)-(c) (1992);

Mass. Ann. Laws ch. 265, § 39 (Law. Co-op. 1992);

Mich. Comp. Laws Ann. § 750.147b (West 1991);

Minn. Stat. Ann. § 609.2231(4) (West 1987 & Supp. 1992);

Mo. Ann. Stat. § 574.093 (Vernon Supp. 1992);

Mont. Code Ann. § 45-5-222 (1991);

Nev. Rev. Stat. Ann. § 207.185 (Michie Supp. 1991);

N.H. Rev. Stat. Ann. § 651:6I(g) (1986 & Supp. 1991);

N.J. Stat. Ann. § 2C:12-1.e (West 1982 & Supp. 1992);

N.Y. Penal Law § 240.30-.31 (McKinney 1989);

Ohio Rev. Code Ann. § 2927.12 (Baldwin 1992);

Okla. Stat. Ann. tit. 21, § 850(A) (West Supp. 1992);

Or. Rev. Stat. §§ 166.155-.156 (1991);

18 Pa. Cons. Stat. Ann. § 2710 (1983)

Vt. Stat. Ann. tit. 13, § 1455 (Supp. 1991)

Wash. Rev. Code Ann. § 9A.36.080(1)(a) (West Supp. 1992);

See Also

Cal. Penal Code § 422.6 (West Supp. 1992);

Fla. Stat. Ann. § 775.085 (West 1992);

Idaho Code § 18-7902 (1987)

N.J. Stat. Ann. § 2C:44-3.e (West 1982 & Supp. 1992);

N.D. Cent. Code § 12.1-14-04 (1985);

R.I. Gen. Laws § 11-42-3 (Supp. 1991);

D.C. Code Ann. §§ 22-4001-4004 (Supp. 1992).

102D CONGRESS
2D SESSION **H.R. 4797**

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1992

Mr. SCHUMER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

SEC. 2. DIRECTION TO COMMISSION.

(a) IN GENERAL.--Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing

guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. In carrying out this section, the United States Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances which might justify exceptions.

(b) DEFINITION.--As used in this Act, the term "hate crime" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.

102D CONGRESS
2D SESSION **S. 2522**

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

IN THE SENATE OF THE UNITED STATES

APRIL 2 (legislative day, MARCH 26), 1992

Mr. SIMON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

SEC. 2. DIRECTION TO COMMISSION.

(a) IN GENERAL.--Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing

guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.

(b) DEFINITION.--As used in this Act, the term "hate crime" means a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another person or group of persons.

STATE v. WYANT
Statement of the Case

THE STATE OF OHIO, APPELLEE,
v. WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT,
v. MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT,
v. STANTON ET AL, APPELLEES.

THE STATE OF OHIO, APPELLANT,
v. VAN GUNDY ET AL, APPELLEES.

[Cite as *State v. Wyant* (1992), ___ Ohio St.3d ___.

Criminal law--Ethnic intimidation--
R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

(Nos. 91-199, 91-1519 and 91-1211/91-1589-
Submitted April 15, 1992--
Decided August 26, 1992.)

APPEAL from the Court of Appeals
for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477, 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else and so he rented L-18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A park official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant. Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the state, the court of appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware App. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. *See State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*,

certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.

Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.

Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.

Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric A. Walker* as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91-1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91-199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart*; *Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No. 91-199.

Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order

of Police and Buckeye State Sheriff's Association in case No. 91-199.

Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, city of Columbus in case Nos. 91-1211/91-1589.

Jones, Day, Reavis & Pogue, Steven T. Catlett and *Richard A. Cordray, Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft*; *Ruth L. Lansner, Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.

Alphonse A. Gerhardstein, urging reversal for *amici curiae*. Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

Herbert R. Brown, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society-threatening problem. However, the legislative response to this problem must not violate the Ohio and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I

The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06 or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering (R.C. 2909.06),[3] criminal mischief (R.C.

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[1]R.C. 2903.21 (aggravated menacing) reads in part:

"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

[2]R.C. 2903.22 (menacing) reads in part:

"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

[3]R.C. 2909.06 (criminal damaging or endangering) reads in part:

"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:

"(1) Knowingly, by any means;

2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], or [5].[5]

"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

[4]R.C. 2909.07 (criminal mischief) reads in part:

"(A) No person shall:

"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

[5]R.C. 2917.21 (telephone harassment) reads in part:

"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:

"(3) During the telephone call, violates section 2903.21 of the Revised Code;

"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

The predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II.

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318-324; *see also*, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C-890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your

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[6]Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's

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[7]The Ohio statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards

state of mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psycopath, on the other hand, may intend to kill and yet have no motive.

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a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

[8]Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this

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[9]The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be

context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can

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present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code;

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

[10]LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes *as not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

increase the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C

Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as

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[11]R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"* * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealously, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and

"disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854-1855, 52 L.Ed.2d 396, 415, fn. 15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265-266, 97 S.Ct. 555, 563-564, 50 L.Ed.2d 450, 464-465. It is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*. "* * * Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs*, *supra*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection
to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12] Federal First

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[12]The First Amendment to the United States Constitution reads:

Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

> "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 11, Article 1 of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565-566, 89 S.Ct. 1243, 1248-1249, 22 L.Ed.2d 542, 550, stated as follows:

> "* * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> "* * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[18] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects."

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[18]The parties do not contest that the predicate offenses are punishable.

It follows that a citizen of Ohio is free to *have* "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?[14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly--and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the

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[14]As Judge West of the Franklin County Court of Common Pleas said:

> "[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166. Unreported.

beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Local Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas, J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

"* * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564: "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law. *R.A.V. v. St. Paul* (1992), 505 U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads: "Whoever

places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.'" *Id.*, 505 U.S. at ___, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct, that is, conduct which will arouse anger, alarm or resentment on the basis or race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ___, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on content. The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), ___ Wis.2d ___, ___, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. 939.645 (1989-90). Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted

bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of offensive motive or thought." *Id.* at ___, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra*, 505 U.S. at ___, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the

concurring opinion by Justice White in *R.A.V. v. St. Paul*, *supra*, 505 U.S. at ___, 112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case Nos. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgements accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, J., of the First Appellate District, sitting for SWEENEY, J.

FILED: August 27, 1992

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

DARIN DALE PLOWMAN,

Petitioner on Review.

(CC C89-12-36912; CA A65145; SC S38328)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 5, 1992.

J. Marvin Kuhn, Chief Deputy Public Defender, Salem, argued the cause for petitioner on review. With him on the petition was Sally L. Avera, Public Defender, Salem.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent on review. With him on the reponse to the petition were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Rex Armstrong, of Bogle & Gates, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon, Inc.

GRABER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Multnomah County Circuit Court,
James R. Ellis, Judge.
107 Or App 782, 813 P2d 1114 (1991).

GRABER, J.

INTRODUCTION

The issue in this case is the constitutional validity of ORS 166.165(1)(a)(A), the statute that creates and defines the crime of intimidation in the first degree.[1] Defendant and three codefendants were charged with violating ORS 166.165(1)(a)(A), which makes it a crime for two or more persons, acting together, to "[i]ntentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation." Defendant demurred on the grounds that the statute is vague and that it burdens his rights to speak and to express his opinions freely.

The trial court overruled the demurrer. Defendant pleaded not guilty. A jury convicted him.[2] Defendant appealed his conviction for intimidation, contending that the trial court erred in overruling his demurrer. The Court

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[1]Defendant's challenge is only to the statutory paragraph under which he was charged: ORS 166.165(1)(a)(A). Nothing in this opinion is meant to express any view as to the constitutionality of any other portion of that statute.

[2]Defendant was also charged with, and convicted of, fourth degree assault, ORS 163.160. That statute provides in part:

> "(1) A person commits the crime of assault in the fourth degree if the person:
>
> "(a) Intentionally, knowingly or recklessly causes physical injury to another[.]"

Defendant does not dispute the validity of that conviction.

of Appeals affirmed. *State v. Plowman*, 107 Or App 782, 813 P2d 1114 (1991). We allowed review to address the important constitutional questions involved and now affirm.

The Court of Appeals stated the facts in *State v. Hendrix*, 107 Or App 734, 737-38, 813 P2d 1115 (1990), which involved one of defendant's codefendants:

> "The evidence showed that [Hendrix] and his three cohorts, [defendant], Neill and Schindler, drove to a Portland store at Southeast 136th and Powell Boulevard to buy beer. * * * [Defendant] and Neill went inside the store. [Hendrix] and Schindler walked behind the store to urinate.
>
> "Serafin and Slumano, the victims, arrived at the store in Slumano's vehicle. Serafin wanted to make a telephone call. Schindler returned to the front of the store, approached Serafin and asked him if he had any cocaine. Serafin, who speaks only a little English, said he did not have anything and started to walk away. Schindler attacked him, beating him on the head and kicking him. Neill joined Schindler in the attack. [Defendant] and [Hendrix] began beating Slumano, who was sitting in his car. [Defendant] punched Serafin; Schindler kicked him. Serafin fell to the pavement. [Hendrix] pinned Serafin's back to the pavement and repeatedly slammed the store's metal-framed glass entry door against his head. [Hendrix] and his three associates took turns beating Serafin and Slumano, sometimes ganging up three against one. Serafin and Slumano were unarmed and did not fight back. * * *
>
> "During the attack, which lasted about two minutes, eyewitnesses heard Neill shout at Serafin, 'Talk in English, motherfucker.' [Defendant] and Schindler screamed 'white power' or 'white pride' loud enough to be heard 50 feet away. [Defendant] yelled, 'Knock it off with us white boys.' When the store clerk told the assailants that she had called the police, [defendant] became even more agitated and screamed, 'They're just Mexicans' and 'They're just fucking wetbacks.' As [Hendrix] and the three cohorts sped away in their car, someone inside the car shouted 'white power.'"

CONSTITUTIONAL ISSUES

A. Vagueness Challenge under the Oregon Constitution

Defendant contends that ORS 166.165(1)(a)(A) violates Article I, sections 20 and 21, of the Oregon Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because its terms are vague. We analyze his contention under the Oregon Constitution first. *See State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (courts should decide questions of state law before reaching federal constitutional issues).

"The terms of a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties." *State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985). A "reasonable degree of certainty" about what conduct falls within the statute's prohibition is required; absolute certainty is not. *State v. Cornell/Pinnell*, 304 Or 27, 29-30, 741 P2d 501 (1987). In addition to giving fair notice of prohibited conduct, a criminal statute must not be so vague as to allow a judge or jury unbridled discretion to decide what conduct to punish. *Id.* at 29. A law that gives such unbridled discretion to judges and juries offends the principle against *ex post facto* laws embodied in Article I,

section 21, of the Oregon Constitution,[3] and the principle against standardless and unequal application of criminal laws embodied in Article I, section 20, of the Oregon Constitution.[4] *State v. Graves*, *supra*, 299 Or at 195.

Defendant's challenge is directed to the phrase "because of their perception of [the victims'] race, color, religion, national origin or sexual orientation." ORS 166.165(1)(a)(A). He argues that that phrase is "inherently nebulous and imprecise." Consequently, he asserts, it invites standardless prosecution. He claims that prosecutors will be able to charge, and juries will be able to convict, under the statute whenever the race, color, religion, national origin, or sexual orientation of the assailants differs from that of the victim. We disagree.

The crime is defined in sufficiently clear and explicit terms to apprise defendants and others of what conduct is prohibited. ORS 166.165(1)(a)(A) prohibits two or more assailants, acting together, from causing physical injury to another because the assailants perceive the victim to belong to one of the specified groups. The challenged phrase means simply that the assailants' perception need not be accurate for them to have committed the crime of intimidation in the first degree. For example, if the assailants, acting together, intentionally cause physical

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[3]Article I, section 21, of the Oregon Constitution provides in part:

> "No *ex-post facto* law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *."

[4]Article I, section 20, of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

injury to a victim because they perceive the victim to be Catholic, the assailants have committed the crime of intimidation in the first degree even if the victim is not in fact Catholic, but is instead Episcopalian.

Defendant's assertion that the statute invites prosecution whenever the race of the assailants and the victim happen to differ misses the point in at least two respects. First, even where race is the alleged motivating factor, the perpetrators and the victim do not have to be of different races. Second, the statute requires that the assailants inflict the physical injury "because of" their perception that the victim belonged to a specified group. The statute expressly and unambiguously requires the state to prove a *causal connection* between the infliction of injury and the assailants' perception of the group to which the victim belongs. *See State v. Brown*, 310 Or 347, 353-54, 800 P2d 259 (1990) (under ORS 163.095(2)(a), defining a form of aggravated murder, the state must prove a *causal connection* between the murder and the victim's status as a witness, juror, police officer, or other person with duties to the criminal justice system); *State v. Maney*, 297 Or 620, 626, 688 P2d 63 (1984) (same). The trier of fact must find all the essential elements of the crime beyond a reasonable doubt. *State v. Williams*, 313 Or 19, 24, 828 P2d 1006 (1992).

ORS 166.165(1)(a)(A) is not unconstitutionally vague under Article I, sections 20 and 21, of the Oregon Constitution.

B. Vagueness Under the United States Constitution

Defendant argues that the statute is vague under the Constitution of the United States for the same reasons that he advances under the Oregon Constitution. The Supreme Court of the United States has interpreted the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to prohibit the states from enforcing

vague criminal laws. *Lanzetta v. New Jersey*, 306 US 451, 59 S Ct 618, 83 L Ed 888 (1939).

A "void for vagueness" analysis under the federal constitution is much like the Oregon analysis. *State v. Robertson*, 293 Or 402, 409, 649 P2d 569 (1982). In order to withstand a vagueness challenge, a statute that defines a criminal offense must give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *United States v. Murphy*, 809 F2d 1427, 1431 (9th Cir 1987) (citing *Kolender v. Lawson*, 461 US 352, 357, 103 S Ct 1855, 75 L Ed 2d 903 (1983)). Moreover, the law must provide explicit standards so that those who enforce and apply the law do not do so in an arbitrary or discriminatory fashion. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 503, 102 S Ct 1186, 71 L Ed 2d 362 (1982). As our discussion under the Oregon Constitution reveals, ORS 166.165(1)(a)(A) does both and, accordingly, does not offend the Due Process Clause.

ORS 166.165(1)(a)(A) is not unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

C. Article I, Section 8, of the Oregon Constitution

Defendant next argues that ORS 166.165(1)(a)(A), on its face, violates Article I, section 8, of the Oregon Constitution. Article I, section 8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Defendant contends that ORS 166.165(1)(a)(A) both restrains the free expression of his opinion and also restricts his right to speak.

Defendant asserts that the intimidation law punishes the free expression of opinion, because it enhances the punishment that he otherwise would receive for an assault *solely* on the basis of his expression of his beliefs. Assault in the fourth degree, the other crime of which defendant was convicted, is a Class A misdemeanor, ORS 163.160(2), but intimidation in the first degree is a Class C felony, ORS 166.165(2). Defendant contends that the act in both crimes is the same -- assault -- and that the legislature has singled out for enhanced penalty those persons who hold particular beliefs when they commit the assault. He also argues that the statute thus restricts speech, because a violation of it "must necessarily be proved by the content of his speech or associations."

In *State v. Robertson*, *supra*, this court established a framework for evaluating whether a law violates Article I, section 8. First, the court recognized a distinction between laws that focus on the *content* of speech or writing and laws that focus on proscribing the pursuit or accomplishment of *forbidden results*. 293 Or at 416-17. The court reasoned that a law of the former type, a law "written in terms directed to the substance of any 'opinion' or any 'subject' of communication," violates Article I, section 8,

> "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412.

Laws of the latter type, which focus on forbidden results, can be divided further into two categories. The first category focuses on forbidden effects, but expressly

prohibits expression used to achieve those effects. The coercion law at issue in *Robertson* was of that category. *Id.* at 417-18.[5] Such laws are analyzed for overbreadth:

> "When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" *Ibid.*

The second kind of law also focuses on forbidden effects, but without referring to expression at all. Of that category, this court wrote:

> "If [a] statute [is] directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert (apart from a vagueness claim) that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to article I, section 8." *Id.* at 417.

Defendant characterizes ORS 166.165(1)(a)(A) as a law that expressly proscribes opinion or speech. He argues that the law might be constitutional if it proscribed a forbidden effect, but that it does not do so.

Our first task, then, is to determine whether the law is "written in terms directed to the substance of any 'opinion'

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[5]The laws upheld in *State v. Moyle*, 299 Or 691, 705 P2d 740 (1985) (harassment, formerly ORS 166.065(1)(d), now ORS 166.065(1)(c)), and *State v. Garcias*, 296 Or 688, 679 P2d 1354 (1984) (menacing, ORS 163.190(1)), and the laws struck down in *State v. Spencer*, 289 Or 225, 661 P2d 1147 (1980) (disorderly conduct, *former* ORS 166.025(1)(c), *repealed by* Or Laws 1983, ch 546, § 5), and *State v. Blair*, 287 Or 519, 601 P2d 766 (1979) (harassment, ORS 166.065(1)(c), *amended by* Or Laws 1981, ch 468, § 1), also were of that category.

or any 'subject' of communication." *State v. Robertson*, *supra*, 293 Or at 412. We conclude that it is not. ORS 166.165(1)(a)(A) contains four elements: (1) Two or more persons must act together; (2) they must act because of their perception of the victim's race, color, religion, national origin, or sexual orientation; (3) they must cause physical injury to the victim; and (4) they must cause the physical injury intentionally, knowingly, or recklessly. Persons can commit that crime without speaking a word, and holding no opinion other than their perception of the victim's characteristics.

Defendant's primary argument is that the second element proscribes opinion, because it enhances the penalty for assault based entirely on the assailants' beliefs. First, we disagree with defendant that the crime defined by ORS 166.165(1)(a)(A) differs from assault *solely* because the attack was precipitated by the assailants' perception that the victim belonged to a specified group. Another element of the crime differentiates intimidation in the first degree from fourth degree assault. The first element of intimidation in the first degree is that two or more persons act together. There is no similar requirement in fourth degree assault. *See* ORS 163.160(1)(a) (quoted in note 2, *supra*).

We also reject the broader argument that ORS 166.165(1)(a)(A) proscribes opinion. Rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that that victim belongs to a particular group. The assailants' opinions, if any, are not punishable as such. ORS 166.165(1)(a)(A) proscribes and punishes committing an act, not holding a belief. Put differently: One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group.

(Indeed, one need not hate at all to commit this crime; one need only meet the four elements stated above.)

In enacting the intimidation statute, the legislature determined that the potential for harm is greater when two or more assailants act together than when an assailant acts alone and that causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes -- because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member -- invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs.[6] Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.

We next address defendant's contention that ORS 166.165(1)(a)(A), in effect, proscribes communication, because "it must necessarily be proved by the content of his speech or associations." As we have noted, it is not an element of the crime that communication occur; defendant appears to concede that the crime does not *expressly*

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[6]The statute was first enacted in 1981 at the request of then-Governor Vic Atiyeh. Minutes, House Judiciary Committee, Subcommittee 1, April 14, 1981, Exhibit A, Testimony of Bob Oliver, Legal Counsel to the Governor. Governor Atiyeh sponsored the measure out of concern that assault coupled with the requisite intent is more likely than other assault to result in retaliatory violence and to threaten social order. House Committee on Judiciary, Subcommittee 1, March 9, 1983, HB 2803, Exhibit C, p 2. *See also* House of Representatives, Judiciary Committee, Staff Measure Analysis, prepared by the Committee's Legal Counsel (discussing purpose of bill).

proscribe communication. The answer to defendant's argument that ORS 166.165(1)(a)(A), *in effect*, proscribes communication is twofold.

First, ORS 166.165(1)(a)(A) need not be proved by speech or associations. For example, if the state showed that every Saturday night for two months the defendants traveled to an area with a large Hispanic population and assaulted a Hispanic person, the trier of fact could infer that the defendants intended to cause physical injury to the present victim because he is perceived to be Hispanic.

Second, there is a distinction between making speech the crime itself, or an element of the crime, and using speech to prove the crime. As discussed earlier in this opinion, a defendant who makes a facial challenge to a statute under Article I, section 8, must demonstrate the former -- that the legislature intended to punish the speech itself. *State v. Robertson*, *supra*.

Speech is often used to prove crimes that do not proscribe speech, particularly the intent element of those crimes. For example, if an assailant grabs a woman's arm and strikes her, stating "I am going to kill you," the state can use the assailant's words to prove the crime of attempted murder, because the words reveal the necessary intent. *See* ORS 163.115 (defining murder); ORS 161.405 (a person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime). But the words themselves are not an element of the crime of attempted murder; they simply make the required intent manifest. When the assailant has committed the act with the necessary intent, the assailant has committed the crime, whether or not the assailant spoke. Similarly, if assailants yell racial epithets while acting together to cause physical injury to a victim whom they perceive to be a member of the race at which the epithets are aimed, their words can be used to prove their perception of the victim's race and their intention to cause

physical injury to the victim because of that perception, but the words themselves are not an element of the crime.

Defendant's argument that ORS 166.165(1)(a)(A) is facially invalid under Article I, section 8, of the Oregon Constitution fails.

D. First Amendment

Defendant contends that ORS 166.165(1)(a)(A) "punishes speech" and, therefore, offends the First Amendment to the Constitution of the United States. He offers no independent analysis under the First Amendment, but relies on the arguments that he articulated in his challenge under Article I, section 8, of the Oregon Constitution.

The First Amendment provides in part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."[7]

The First Amendment generally prevents government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul*, 112 US 2538, ___ S Ct ___, ___ L Ed 2d ___ (1992). The defendant in that case had been charged with violating a St. Paul, Minnesota, ordinance prohibiting the placement on public or private property of a symbol that one knows or should know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or sex. The Supreme Court of the United States held that "the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S Ct at 2542.

[7]The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1925).

The Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct. With respect to the latter, the Court wrote:

> "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S Ct at 2546-47.

As discussed in Part II C, *ante*, ORS 166.165(1)(a)(A) is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here. The defendant in *R.A.V.* also had been charged with violating a Minnesota statute that punishes racially motivated assaults, but he did not challenge that statute. 112 S Ct at 2542 n 2.

The Wisconsin Supreme Court has ruled on the constitutionality of a law punishing racially motivated assaults. That court recently held that Wisconsin's intimidation statute is unconstitutional under the First Amendment. *State v. Mitchell*, 169 Wis 2d 153, 485 NW2d 807 (1992). That statute increases the penalties for certain underlying crimes if the actor "[i]ntentionally selects the person against whom the crime * * * is committed * * * because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." *Id.* at ___ n 1. The majority of that court reasoned that the Wisconsin statute punishes the defendant's biased thought. The majority further reasoned that the statute punishes speech, because the element of discriminatory selection of the victim is generally proved by evidence of the defendant's speech. Because of our analysis of the way in which ORS 166.165(2)(a)(A) functions, see Part II C, *ante*, we disagree with that reasoning.

We also note a distinction between the statute at issue in this case and the statute considered in *State v. Mitchell*, *supra*. As discussed above, ORS 166.165(1)(a)(A) contains the requirement that two or more people act together. The statute in question in *Mitchell* did not contain that requirement. *Id.* at ___ n 1.

To summarize, in our analysis under the Oregon Constitution, we concluded that ORS 166.165(1)(a)(A) does not proscribe speech or target conduct on the basis of its expressive content. Accordingly, we conclude that ORS 166.165(1)(a)(A) does not violate the First Amendment to the Constitution of the United States.

CONCLUSION

ORS 166.165(1)(a)(A) is not void for vagueness under either Article I, sections 20 or 21, of the Oregon Constitution, or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Neither does ORS 166.165(1)(a)(A) on its face offend Article I, section 8, of the Oregon Constitution, or the First Amendment to the Constitution of the United States.

The decision the Court of Appeals and the judgment of the circuit court are affirmed.

DEC 11 PM 1

(2)

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION

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WIS. STAT. §970.03(3) 3

WIS. STAT. §947.01 11

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STATE OF WISCONSIN,

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v.

TODD MITCHELL,

Respondent.

On Petition For a Writ of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION

QUESTION PRESENTED

Prior to its amendment, did Wisconsin Statute §939.645 (1989-90), violate the First and Fourteenth Amendments to the U.S. Constitution?

STATEMENT OF THE CASE

Wisconsin's Statement of the Case is factually accurate but fails to note that the statute involved has been amended.

Just over one month before the Wisconsin Supreme Court rendered its decision in this case, the Statute under which Todd Mitchell had been prosecuted was amended. 1991 Wisconsin Act 291[1] (effective May 13, 1992). The amendment inserted the words "in whole or in part" before the phrase "because of" so that the hate crimes enhancer statute, as amended, increases punishment for crimes whenever the actor selects the victim of the crime "in whole or in part because of" the actor's belief or perception of the victim's race or other specified characteristics whether or not that belief or perception was correct. The case had been briefed before enactment of this amendment, and the Wisconsin Supreme Court made only passing reference to the amendment.

As best we understand the legal conclusions and opinions expressed in footnote 1 of Wisconsin's Statement of the Case, we do not agree with them. Footnote 1 in Wisconsin's Statement of the Case notes that, under subsection (2)(b) of

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[1]The Act amending the statute reads, in pertinent part:

> SECTION 1. 939.645(1)(b) of the statutes is amended to read:
> 939.645(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

the Wisconsin hate crimes penalty enhancer, Class A misdemeanors become felonies. The state then opines that "the language of this subsection leaves some doubt as to whether this change in status is automatic" and that this portion of the statute has no relevance to Mitchell. Neither the precise nature of the state's doubts nor its meaning of "automatic" is clear. But the state cannot seriously dispute that a Class A misdemeanor becomes a felony as soon as the prosecutor decides to charge that misdemeanor under the hate crimes enhancement statute.

The effect of subsection (2)(b) is to convert any Class A misdemeanor to a felony. Under Wisconsin criminal procedure, a defendant charged with a felony must be given a preliminary examination unless waived by the defendant, Wis. Stat. §971.02 (1989-90), and the judge presiding at the defendant's very first appearance in court is required to inform the defendant of his right to a preliminary examination, Wis. Stat. §970.02(1)(c) (1989-90). A plea cannot be accepted in any case in which a preliminary examination is required until the defendant has been bound over following a preliminary or waiver thereof. Wis. Stat. §970.03(3) (1989-90). It follows that a Wisconsin Prosecutor must choose at the commencement of prosecution whether a Class A Misdemeanor is to be charged under the hate crime enhancement statute and thereby concerted to a felony. In this sense, this change in status is automatic as soon as the district attorney starts a prosecution.

SUMMARY OF ARGUMENT

This case presents no issue that has not already definitively resolved by this Court in *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 (1992) That case required the same result reached by the Wisconsin Supreme Court. Moreover, the 1992 amendment to Wisconsin's hate crimes enhancer statute raises a question about the meaning of the phrase "because of" in the original statute.

Accepting the Mitchell case will require federal constitutional analysis of the overbreadth of the hate crimes enhancement statute. The breadth of that statute turns, in large part, on the meaning given to the phrase "because of" when a criminal selects a victim "because of" the race of other specified characteristics of the victim. The recent amendment to the Wisconsin Statute suggests that the original intent of the legislature was to read the phrase "because of" in its broadest sense as "in whole or in part because of" so that the original statute is substantially overbroad. If on the other hand the amendment represented a substantial broadening of the meaning of the phrase "because of" then this Court is being asked to review a now defunct statute with little public importance in Wisconsin or elsewhere. Lacking any authoritative interpretation of the phrase "because of" from any Wisconsin court, this Court cannot

authoritatively resolve the meaning of this phrase in order to analyze the breadth of the statute.

ARGUMENT

I. THE HATE PENALTY ENHANCER STATUTE PUNISHES THOUGHT AND EXPRESSION BASED ON ITS CONTENT IN VIOLATION OF THE FIRST AMENDMENT AND THIS COURT'S DECISION IN R.A.V. *v.* CITY OF ST. PAUL.

In *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S.___, 112 S. Ct. 2538 (1992), this Court held that government may not regulate speech based on content even where the speech falls into an otherwise unprotected category such as fighting words. The First Amendment prohibits government from picking and choosing among those words, criminalizing some but not others, based on special hostility toward the offensive viewpoint they express. Wis. Stat. §939.645 violates the First Amendment and this Court's decision in *R.A.V.* by punishing thought and expression based on its bigoted content. The Wisconsin Supreme Court correctly concluded that, "[t]he hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." *State v. Mitchell*, 169 Wis. 2d 153, 163, 485 N.W.2d 807, 811 (1992). The statute separately criminalizes and punishes that offensive thought. Any conduct involved in a prosecution under the penalty enhancer is already punishable under Wisconsin's criminal code. Proof of that conduct alone is insufficient to invoke the penalty enhancer. Nor is the penalty enhancer invoked when that

conduct is particularly heinous or when the injury to the victim is particularly severe. Rather, the penalty enhancer operates to add an additional penalty when the offender has engaged in that conduct for one of the prohibited reasons. The offender's bigoted ideology and bigoted thoughts about his victim are the only bases for substantial additional penalties.

Petitioner argues that the statute punishes the "criminal conduct" involved in the "victim selection process" Petition for Certiorari at p. 15. This argument, however, ignores the authoritative construction which the Wisconsin Supreme Court has already given to the words, "intentionally selects" and "because of" in the Statute. *Mitchell*, 169 Wis. 2d at 164-168, 485 N.W.2d at 812-813, (A.8-11). Although the Statute refers to intentional selection of a victim, the *Mitchell* Court concluded that it is the "because of" aspect of the selection that the statute punishes. 169 Wis. 2d at 164, 485 N.W.2d at 812, (A.8). The *Mitchell* court construed the statute to be, "expressly aimed at the bigoted bias of the actor." 169 Wis. 2d at 166, 485 N.W.2d at 813, (A.11). This Court is bound by the construction given to §939.645 by the Wisconsin Supreme Court. *R.A.V.*, 112 S. Ct. at 2542, citing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339, 106 S. Ct. 2968, 2975-2976 (1986); *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S. Ct. 3348, 3361, n. 24 (1982); *Terminello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 895-896 (1949). Any argument that the

statute regulates criminal conduct is improper since the statute as authoritatively construed by the State Supreme Court is directed, not at conduct, but at motive.

Petitioner seeks to justify this separate punishment of offensive motive by analogizing to the varying punishments for different degrees of homicide based upon intent. The comparison breaks down, however, because it ignores the fundamental difference between motive and intent. Criminal jurisprudence has long recognized this distinction. Unlike intent, "motive is not relevant on the substantive side of the criminal law. W. LaFave and A. Scott, Criminal Law, §3.6 at 227 (2d Ed. 1986). Intent determines an actor's culpability based upon his volition. Motive is the actor's underlying reason for acting. In the homicide example used by Petitioner, intent refers to whether the homicide was inadvertent, reckless or the result of a conscious choice by the actor to kill someone. Obviously, manslaughter is completely different conduct than cold blooded murder. Therefore, differences in punishment based upon different levels of volition are appropriate. On the other hand, motive in the homicide example would be nothing more than the thoughts and belief systems that prompted the offender to act.

The thoughts and belief systems of the offender are protected by the First Amendment. That the offender may have violated a criminal law "because of" these thoughts does not

somehow deprive the thoughts of their First Amendment protection. If it were otherwise, the State of Texas could have escaped this Court's decision in *Texas v. Johnson*, 491 U.S. 397, 109S. Ct. 2533, 105 L.Ed.2d 342 (1989) by prohibiting public burning and then enacting a penalty enhancer that would apply whenever a person commits the offense of public burning "because of" his opposition to the policies of the government. The constitution would not allow this extra punishment for the offender's unacceptable thought. Yet this is precisely the effect of Wisconsin's hate crimes law.

The Wisconsin Supreme Court correctly held that in addition to violating the First Amendment directly by punishing offensive thought, the statute also, "violates the First Amendment indirectly by chilling free speech." *Mitchell*, 169 Wis. 2d at 163, 485 N.W.2d at 811, (A.7). The penalty enhancer does not expressly punish bigoted speech or association. However, enforcement of the statute almost invariably relies on the offender's speech and association as the only evidence of the bad motive the statute seeks to punish. The distinction between the use of the offender's speech and associations as the only evidence of this motive, and punishment of the words and associations themselves is so fine as to be non-existent. As the Wisconsin Supreme Court noted in Mitchell:

> … there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if

> A strikes B in the face he commits a criminal battery. However, should A add a word such a "nigger," "honkey," "jew," "mick," kraut," spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone--but for using the spoken word. …
>
> 169 Wis.2d at 174, 485 N.W.2d at 816,(A.18).

When the offender's motive is evidenced only by words, it is the words themselves that are punished.

Moreover, the penalty enhancer does not require a contemporaneous expression of bigotry. Any time someone is charged with a crime he is subject to the penalty enhancer if the state can prove that he had bigoted views and was acting upon them at the time of the offense. In addition to any words the defendant may have spoken while committing the offense, all of his remarks on prior occasions, the books he has read, the lectures he has attended, the people he has associated with, or the organizations to which he belongs can all be introduced as evidence that his selection of his victim was motivated by bigotry. *See e.g. Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991) (arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults.")

Thus, the effect of the statute is to punish bigoted speech and association, and the bigoted thought manifested thereby, based on its content. In *R.A.V.*, this Court held that the St. Paul ordinance at issue violated the First Amendment when it "proscribed fighting words of whatever

manner that communicate messages of racial, gender or religious intolerance." 112 S. Ct. at 2549. The Court observed that, "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." 112. S.Ct. at 2549. Wisconsin's penalty enhancer goes even further than the ordinance at issue in *R.A.V.* Not only does the Wisconsin law enhance the penalties for thought/speech which communicates messages of intolerance, it does so regardless of whether the speech can be characterized as fighting words.

It is immaterial that Wisconsin's statute punishes this speech and the underlying viewpoint only when it is linked to criminal conduct. In *R.A.V.* the message of the defendant was inextricably linked to criminal conduct. In that case, the defendant's act of burning a cross on a black family's lawn could have legitimately been prosecuted under any one of a number of content neutral criminal statutes. *R.A.V.* 112 S.Ct. at 2541. In *R.A.V.*, this Court held that while the defendant could have been punished for his criminal conduct under content-neutral laws, he could not be chosen for special punishment based upon the content of his message. 112 S.Ct. at 2541, 2549. Similarly, the State of Wisconsin could prosecute Todd Mitchell under content-neutral criminal statutes. However, the State may not separately punish Todd Mitchell's statements or their underlying thoughts or attitudes, based on their offensive content. The expressive element does not shield the offender from prosecution for his

criminal conduct. However, the criminal conduct does not deprive the offender's expression or beliefs of First Amendment protection.

In fact, Wisconsin's penalty enhancer reaches situations in which the underlying offense openly involves speech For example, in Wisconsin, a prosecution for disorderly conduct can be based upon fighting words alone without any accompanying conduct. An offender need not burn a cross or engage in any conduct other than the uttering of abusive or profane fighting words to be convicted of disorderly conduct.[2] Disorderly conduct is ordinarily punishable by a maximum fine of $1,000 and a maximum period of incarceration of 90 days. Wis. Stats. §947.01 (1989-90), §939.51 (1989-90). The penalty enhancer automatically bumps the penalty up to a maximum fine of $10,000 and a minimum period of incarceration of one year if the offender's fighting words contain any of the prohibited bigoted content. Similarly, Defamation, under Wis. Stat. § 942.01 or Giving False Information for Publication under Wis. Stat. § 942.03, which are each normally "Class A" misdemeanors, become felonies when the relevant speech contains any of the outlawed bigoted

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[2]Wisconsin's Disorderly Conduct Statute, §947.01, provides: **Disorderly Conduct.** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The Statute on its face reaches speech that is "profane," "abusive," or "unreasonably loud" if it spoken under circumstances such that it would, "tend to cause or provoke a disturbance." The Wisconsin Supreme Court held that this statute is not overbroad. State of Wisconsin v. Zwicker, 41 Wis. 2d 497, 508-511, 164 N.W. 2d 5121, 518-519 (1969). The Court relied heavily on Chaplinsky v. New Hampshire, 315 U. S. 568, 62 S. Ct. 766 (1942), and appeared to limit the reach of the statute to fighting words. Zwicker, 41 Wis. 2d at 510, 164 N.W. 2d at 518-519.

content. These two examples illustrate dramatically that §939.645 exhibits the very same defect this court condemned in *R.A.V.*. It discriminates among otherwise unprotected speech based on content, imposing special punishment upon speakers who speak on the disfavored topics.

Petitioner seeks to distinguish *R.A.V.* by claiming that Wisconsin's penalty enhancer does not single out speech based upon content but, rather, singles out crimes that are directed at certain groups. However, §939.645 does not protect oppressed groups any more that did the St. Paul ordinance condemned in R.A.V. The only relevant consideration under the statute is the bigoted motive of the offender not the victim's membership in a protected group. This is starkly illustrated in the instant case where the defendant is black and the victim white. The Statute does not protect groups. It proscribes "messages of `bias-motivated' hatred . . ." *R.A.V.*, 112 S. Ct at 2548.

Petitioner seeks to justify the penalty enhancer based upon the special harm caused by the bias motivated crimes, asserting that such crimes affect not only the immediate victim, but all members of the targeted group, Petition for Certiorari at p.16. In *R.A.V.* St. Paul's advanced this identical argument. The Court rejected this argument, observing:

> What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing

> other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.
>
> R.A.V., 112 S. Ct. at 2548. (citation omitted).

If the speech that is proscribed by Wisconsin's penalty enhancer results in unique harm, it is because of the content of the message. The State cannot evade the First Amendment by simply declaring that its punishment of speech and thought is based not on its offensive content, but on the special harm resulting from its offensive content.

Petitioner also attempts to fit the penalty enhancer into the "secondary effects" exception outlined by this Court in *R.A.V.*, arguing the Wisconsin statute targets the "particular harm" caused by bias-motivated crime. This argument fails because the "particular harm" referred to by the state amounts to no more than the emotive impact of the offender's bigotry. In *R.A.V.* the Court emphasized that, "[t]he emotive impact of the speech on its audience is not a secondary effect." *R.A.V.*, 112 S. Ct. at 2549 (citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L. Ed.2d 29 (1986)).

Petitioner alternatively asserts that even if the penalty enhancer is a content based regulation of speech, it is permissible because it serves the State's compelling interest in eradicating discrimination against its citizens,

Petition for Certiorari at p.15 n.7. In *R.A.V.* the City of St. Paul advanced a similar argument. The Court recognized that St. Paul's interest in ensuring the basic human rights of its citizens was undoubtedly compelling and that the ordinance could be said to serve that interest. However, the Court cautioned that:

> the "danger of censorship" presented by a facially content-based statute requires that weapon be employed only where it is "necessary to serve the asserted [compelling] interest."
>
> *R.A.V.*, 112 S. Ct. at 2549. (citations omitted).

The Court held that St. Paul's ordinance was not reasonably necessary to achieve St. Paul's interests because the City could have achieved its desired goal with a content neutral ordinance. The Court observed:

> The only interest distinctively served by the content limitation is that of displaying the City Council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.
>
> *R.A.V.*, 112 S. Ct. at 2550. (citations omitted).

In the instant case, as in *R.A.V.*, content-neutral alternatives are available that would achieve the State's compelling interest. For example, the State could enact a penalty enhancer that increases the penalty for crimes that are committed "with specific intent to create terror within a

community." Such an alternative law would serve the State's interest without any reference to the offender's motive or the content of his speech.

As in *R.A.V.*, the availability of adequate content neutral alternatives to Wisconsin's penalty enhancer, "undercuts significantly" any defense of such a statute. *R.A.V.*, 112 S. Ct. at 2550 (citing *Boos v. Barry*, 485 U.S. at 329, 108 S. Ct. at 1168)). As in *R.A.V.* the only interest served by the content-based regulation that would not be served by the content-neutral alternatives is the State's interest in expressing "special hostility towards the particular biases thus singled out." The First Amendment prohibits the State from expressing its hostility toward particular offensive ideas by criminalizing them or their expression.

II. THE WISCONSIN SUPREME COURT'S DECISION IN *MITCHELL* IS CONSISTENT WITH THIS COURT'S DECISION IN *DAWSON v. DELAWARE*.

Petitioner argues that this Court in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), indicated that evidence of racist beliefs may be properly considered at sentencing, Petition for Certiorari at p.12. Petitioner reasons that if racist motive can be considered at sentencing, then it is an appropriate basis for a penalty enhancer.

However, in *Dawson*, this Court actually rejected evidence of racism as proof of an aggravating factor. The

Court did not approve "hatred, bias or prejudice" as themselves constituting aggravating factors. Rather, the Court simply stated that the, "Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing," when that evidence, "might be relevant to proving other aggravating circumstances." Id. at 1097, 1098 (emphasis added).

In *Dawson*, the Court relied on *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). In *Barclay*, the four Justices referred to the fact that the sentencing judge had "discussed" the defendant's racial motive, not that the judge "relied" on racial motive as an aggravating factor. In *Barclay* the Court found that the consideration of this evidence was permissible, not because the defendant's racist motive itself constituted an aggravating factor, but because the evidence was relevant to a content-neutral statutory aggravating factor, i.e., that the offense was committed in an "especially heinous, atrocious or cruel" manner. *Barclay*, 463 U.S. at 949.

This Court's decisions in *Dawson* and *Barclay* make it clear that while evidence of a defendant's bigotry may be introduced as evidence of a content-neutral sentencing factor, this must be done with the utmost caution and only under limited circumstances. Under *Dawson* and *Barclay*, evidence of bigotry may, like any other evidence, be introduced to prove a content-neutral aggravating factor,

despite the fact that the bigotry itself is protected by the First Amendment. However, these cases lend no support to the novel proposition that a defendant's bigoted motive itself can be punished.

Moreover, both *Dawson* and *Barclay* involved factors that could only be considered once the appropriate sentencing range had been fixed by the legislature. In contrast, Wisconsin's penalty enhancer adds an additional penalty beyond the maximum penalty fixed by the legislature for the underlying criminal conduct. In many cases, the penalty enhancer operates to convert a misdemeanor to a felony. Nothing in *Dawson* or *Barclay* supports the proposition that an offender's bigoted motive may, all alone, be used to automatically convert a misdemeanor to a felony, subjecting the offender to several years in prison and all of the other consequences a felony conviction entails[3].

---

3 By converting a Class A misdemeanor to a felony, the statute does far more than enlarge the discretion of the sentencing judge. In Wisconsin, mere conviction of a felony carries substantial collateral consequences whatever sentence is imposed. A felon may not vote until his civil rights are restored upon completion of the sentence. Wis. Const. A. XIII §2; Wis. Stat. §304.078; having been convicted of an "infamous crime" he is probably not eligible to hold "any office of trust, profit or honor" in the state unless given a complete pardon. Wis. Const. A. XIII §3, 65 Opinions of the Attorney General 292. It is a crime under both state and federal law for a felon to possess a firearm. Wis. Stat. § 941.29, 18 U.S.C. § 922(g)(1). Felons are also denied certain licenses, e.g. Wis. Stat. §125.04(5)(b) prohibiting any license or permit relating to alcohol beverages to a person convicted of a felony the person has been duly pardoned.

III. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE 1992 AMENDMENT TO THE HATE CRIMES ENHANCEMENT LAW RAISES AN IMPORTANT QUESTION AS TO THE MEANING OF THE PHRASE "BECAUSE OF" IN THE ORIGINAL STATUTE WHICH QUESTION HAS NEVER BEEN ADDRESSED BY ANY WISCONSIN COURT.

A. THE ADDITION OF THE WORDS "IN WHOLE OR IN PART" HIGHLIGHTS THE AMBIGUITY OF THE PHRASE "BECAUSE OF" IN THE ORIGINAL STATUTE.

The Wisconsin Statute enhances the penalty for crimes when the victim is selected "because of" certain characteristics. The term "because" may be interpreted in a number of ways. It could describe a "but for" notion of causality. It could mean that the specified characteristics were a "substantial factor" in the selection. Or, it could mean that the specified characteristics played any part at all in the selection no matter how small. The 1992 amendment which added the words "in whole or in part" to the phrase "because of" highlighted this original ambiguity. Either the Wisconsin legislature meant to clarify its original meaning or to expand that meaning.

But no Wisconsin court has interpreted this phrase in the hate crimes enhancement statute. Mitchell did not question the interpretation of these words in his vagueness challenge focusing instead on the word "race" and the phrase "intentionally selects" *State v. Mitchell*, 163 Wis.2d 652,659, 473 N.W.2d 1,4 (Ct. App. 1991), (A.57-58). The phrase "because of" must either be interpreted with the expansive causality notion expressed clearly in the 1992

amendment or the original hate crimes enhancement statute is now a dead letter in Wisconsin.

If the Court accepts this case, it must confront the question of the statute's overbreadth. That issue cannot be approached without analyzing the breadth and sweep of the statute. Since the breadth of the statute depends vitally upon the interpretation of the words "because of," this Court will be unable to analyze the overbreadth issue without speculating how Wisconsin courts will interpret this phrase.

B. IF ADDITION OF THE WORDS "IN WHOLE OR IN PART" TO THE PENALTY ENHANCEMENT STATUTE REFLECTS THE WISCONSIN LEGISLATURE'S CLARIFICATION OF ITS ORIGINAL INTENT, THEN THE STATUTE SUFFERS FROM SUBSTANTIAL OVERBREADTH.

The Wisconsin Supreme Court has held that, when a former statute is amended, the amendment is entitled to some weight as an aid to the court in determining legislative intent in the original statute. *McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 427, 312 N.W.2d 37, 43 (1981); *Yanta v. Montgomery Ward & Co.*, 66 Wis.2d 53, 61, 224 N.W.2d 389, 394 (1974); *Milwaukee Fire Fighters Assoc. v. Milwaukee*, 50 Wis.2d 9, 19, 183 N.W.2d 18, 23 (1971). Accordingly, the 1992 amendment to Wisconsin Statute § 939.645 may have merely clarified the original intent of the Wisconsin legislature that the term "because of" should be interpreted expansively as though it read "in whole or in part because of."

Read so expansively, the statute is clearly overbroad. Even if it were constitutionally permissible to enhance punishment for a crime substantially motivated by bias, no compelling state interest is served by enhancing punishment for a crime motivated substantially by other reasons and only incidentally by one of the specified bases. The overly expansive sweep of the statute is then seen clearly in cases of mixed motivation where otherwise protected speech is involved. In a bar fight or argument over a parking space racial or ethnic slurs may regrettably be only too common. In those situations, a simple battery which is a Class A misdemeanor in Wisconsin[4] is raised to a felony even with only partially racial or ethnic motivation.

C. IF THE ADDITION OF THE WORDS "IN WHOLE OR IN PART" EXPAND THE BREADTH OF THE ORIGINAL STATUTE, THEN REVIEW OF THIS CASE HAS LITTLE PUBLIC IMPORTANCE IN WISCONSIN OR ELSEWHERE.

If the 1992 amendment is thought to work a substantial change in the Wisconsin statute, then this Court is being asked to review a now defunct law. We are unaware of any cases now pending under the original unamended hate crimes enhancer statute. It is likely that Todd Mitchell was the last person to be prosecuted under this law before it was amended.

4 Wis. Stat. § 940.19(1).

IV. THE *MITCHELL* DECISION DOES NOT JEOPARDIZE ANTI-DISCRIMINATION LAWS.

Notwithstanding the hyperbole in Wisconsin's Petition, the Mitchell decision does not jeopardize civil anti-discrimination laws. The Wisconsin Supreme court has explicitly disavowed the application of its decision to invalidate any anti-discrimination laws *State v. Mitchell*, 169 Wis.2d at 177-78, 485 N.W.2d at 817, (A.19-20). The Petitioner's claim that *Mitchell* "casts a dark cloud over all anti-discrimination laws in this country" is nothing more than a dispute with the reasoning of the Wisconsin Supreme Court. This is an insufficient reason to invoke the certiorari jurisdiction of this Court.

CONCLUSION

For all the reasons stated above, this court should deny Wisconsin's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 92-515

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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REPLY ARGUMENT

This reply brief primarily responds to the discussion contained in section III of respondent's brief. The petitioner will not reply to the discussions of *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), and *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), contained in sections I and II of respondent's brief. The arguments relating to these decisions are either addressed in the petition or merely serve to further highlight the need for an authoritative decision on the constitutional question presented.

ANALYSIS OF THE FIRST AMENDMENT QUESTION PRESENTED DOES NOT HINGE ON THE PARTICULAR INTERPRETATION GIVEN THE WORDS "BECAUSE OF" IN THE WISCONSIN STATUTE. RATHER, THIS CASE PRESENTS THE CORE FIRST AMENDMENT ISSUE COMMON TO OVER TWENTY OTHER STATE HATE CRIMES PENALTY ENHANCEMENT STATUTES.

The petition in this case presents a core First Amendment question going to the heart, not only of the Wisconsin penalty enhancement statute, but also of similar statutes of many other states. That question is whether the First Amendment prohibits states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender selected his or her crime victim because of the victim's race, color, religion or other specified status.

The petitioner readily admits that the particular wording of the Wisconsin statute and other state statutes may raise other legal questions. For example, even if this Court were to hold that the First Amendment does not prohibit consideration of biased selection in formulating criminal penalties, a particular statute might still be unconstitutionally vague or unconstitutionally overbroad.

The issue raised in section III of respondent's brief provides a good example of a non-core issue. Although he has not before asserted that the meaning of the phrase "because of" is unclear, respondent now contends that the lack of a state court interpretation of this phrase is an impediment to the resolution of the core constitutional issue presented here (respondent's brief at 18-19). Respondent asserts that it is not known with certainty whether the phrase "because of" requires 1) "but for" causation, 2) a showing that status is a "substantial factor" in victim selection, or 3) only a showing that status played a part in victim selection, no matter how small.

The petitioner believes the phrase "because of" in the Wisconsin statute has the same meaning it has in other Wisconsin anti-discrimination statutes. But even assuming the respondent is correct in asserting there is an open question as to the particular meaning of the phrase "because of," the separate and more fundamental First Amendment issue raised in the petition must be addressed.

The validity of the Wisconsin court's constitutional analysis does not turn on the particular meaning of "because of." It would come as a great surprise to the Wisconsin high court to learn that it issued a narrow decision based on a particular view of that phrase. Rather, the Wisconsin court intended to strike a fatal blow at the entire concept of penalty enhancement based on proof that the criminal selected his or her victim by reason of the victim's race or other status. Whether the victim's status played a major role in the selection process or a lesser role, the Wisconsin court has plainly held the penalty range may not be enhanced for that reason. Accordingly, if the Wisconsin court's First Amendment analysis were uniformly followed, all hate crime penalty enhancement statutes in the country, no matter how worded, would fall.

One other aspect of the respondent's brief warrants a reply. The respondent's position on the meaning of the phrase "because of" is inconsistent. In section III of his brief he asserts that no Wisconsin court has construed the phrase "because of." But in section I he asserted that the Wisconsin court has given an "authoritative construction . . . to the words, 'intentionally selects' and 'because of'" (respondent's brief at 6).

In reality, the inconsistency does not exist. A fair reading of the *Mitchell* decision reveals that the state court did not engage in statutory construction. The state court's statement that the statute is directed at "bigoted bias of the actor" is actually the court's constitutional conclusion that the statute violates the First Amendment because it is directed at the motive of the offender. In the state court's view, the statute violates the First Amendment because proof that a defendant selected a person for victimization "because of" the victim's status necessarily involves an inquiry into the motive of the defendant (see *Mitchell* decision in appendix to petition at A12 and A20).

Accordingly, the petitioner agrees with the respondent's assertion in section III of his brief that no Wisconsin court has endeavored to construe the phrase "because of." At the same time the petitioner maintains that a definitive construction of "because of" is unnecessary to the resolution of the core First Amendment issue raised in the petition.

CONCLUSION

This Court should decide the constitutional question presented clearly and cleanly by this case.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 21 1992
OFFICE OF THE CLERK

(3) (3)

Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, et al., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

Brief of *Amicus Curiae* Cook County, Illinois in Support of Petitioners

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Brief of *Amicus Curiae* Cook County, Illinois in Support of Petitioners

INTEREST OF AMICUS CURIAE

The citizens of Cook County, Illinois as amicus curiae have a critical interest in this Court's review of the validity of "hate crimes" statutes which enhance the penalty for crimes committed because of individuals' status within particular groups. In response to a proliferation of such targeted crimes, the Illinois General Assembly has enacted two statutes. One statute creates an offense called a "hate crime" where one commits otherwise criminal acts by reason of the status of others. The other statute adds an

aggravating factor to the Illinois sentencing code where felonies are committed because of such status of the victim. The Cook County State's Attorney's Office created and administers a Hate Crimes Prosecutions Council of prominent community leaders to address the rising problem of hate crimes. Vigorous action is required: statistics for the first eight months of this year show that citizens in the City of Chicago alone have reported hate crimes to the police at a rate of almost one every other day.[1]

The Illinois statutes penalize those who cause not only the harm inherent in the underlying criminal acts but in addition the harm arising from assaulting an entire community whose members are, or fear they will be, singled out for crime. The statutes leave citizens free to express their beliefs about others—no matter how hateful—within the uncensored marketplace of ideas: the statutes reach only those who physically prey on others through criminal acts. The Illinois hate-crime statutes do not target speech or violate the constitutional provisions for freedom of speech. To the contrary, they ensure that individuals cannot, through criminal intimidation, deny entire groups access to the oasis of freedom created by the First Amendment.

The erroneous reasoning of the Wisconsin and Ohio Supreme Courts impedes and may preclude effectuation of the Illinois statutes.[2] This Court's decision in *R.A.V. v.*

[1] According to Chicago Police Department records for January through August 1992, citizens reported 104 hate crimes: 81 by reason of race, 10 by reason of sexual orientation, 8 by reason of religion, and 5 by reason of national origin.

[2] Various state courts have rapidly and inconsistently ruled on the constitutionality of hate-crime statutes. *Compare Dobbins v. Florida*, No. 91-1953, 1992 Fla. App. LEXIS 10062 (Sept. 24, 1992);

(Footnote continued on following page)

City of St. Paul, 112 S. Ct. 2538 (1992), while supportive of the validity of the Illinois laws, is subject to misapplication absent clear elaboration. Defendants charged with hate crimes have begun filing motions to dismiss in the trial courts relying on other states' decisions and misreading of this Court's decision in *R.A.V.*[3] Only immediate review by this Court will avoid delay and chaotic *ad hoc* rulings.

ARGUMENT

REVIEW BY THIS COURT IS ESSENTIAL TO ESTABLISH THAT THE FIRST AMENDMENT DOES NOT APPLY TO STATUTES WHICH PENALIZE THE COMMISSION OF CRIMINAL ACTS BY REASON OF INHERENT OR CORE CHARACTERISTICS OF INDIVIDUALS.

A. The Illinois Hate-Crime Statutes.

Each hate crime is a crime committed against an individual and an assault committed against a larger group. The Illinois hate-crime statute, Ill. Rev. Stat. ch. 38, par.

[2] *continued*

Oregon v. Plowman, No. SC S38328 1992 Ore. LEXIS 158 (Sup. Ct. Aug. 27, 1992) (in banc); *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115 (1991); *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (Crim. Ct. 1988) (all upholding various hate-crime statutes under First Amendment) *with State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992); *Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992) (finding hate-crime statutes violative of First Amendment).

[3] The tenuous situation in Cook County is present throughout the State of Illinois, and undoubtedly nationwide. The Cook County State's Attorney is a member of an Association of 102 State's Attorneys in Illinois, all of whom view hate-crimes prosecution as a high priority and share our concern about the jeopardy in which the Illinois statutes presently stand.

12-7.1, applies when certain crimes—such as assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, or mob action[4]—are committed "by reason of" another individual's or other individuals' race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin. The statute creates a separate offense from the underlying offense. A first offense hate crime is a Class A misdemeanor; subsequent offenses are Class 3 felonies.[5] The underlying crimes range in severity from lower to higher than the hate crime, so that while the statute is not *per se* a sentencing enhancer, it can act as one.[6] In addition to the criminal provisions, the hate crime statute creates a private right of civil action. *See* Ill. Rev. Stat. ch. 38, par. 12-7.1(c). A separate statute, Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(a)(10), is an explicit penalty enhancer in felony cases, creating a factor in aggravation (warranting imprisonment or a lengthened term) where "the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin."

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[4] Effective January 1, 1993, the legislature has amended the underlying offenses to include disorderly conduct and harassment by telephone. P.A. 86-1418, 87-440.

[5] Effective January 1, 1993, a first offense is a Class 4 felony and subsequent offenses are Class 2 felonies. P.A. 86-1418, 87-440.

[6] The hate-crime statute requires the sentencer to impose designated minimum amounts of community service, *see* Ill. Rev. Stat. ch. 38, par. 12-7.1(b), which could optionally be imposed on the underlying convictions, *see* Ill. Rev. Stat. ch. 38, pars. 1005-6-2(b), 1005-6-3(9).

The Wisconsin hate crime statute, Wis. Stat. Ann. sec. 939.645 (West 1982 and Supp.) similarly enhances penalties for any crime defined in the Wisconsin Criminal Code if the offender intentionally selects the victim or owner of property "because of the actor's belief or perception" regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person, even if the actor's belief is incorrect. Finally, the Ohio ethnic intimidation statute, Ohio Rev. Code Ann. sec. 2927.12 (Baldwin 1990), provides special penalties for aggravated menacing, menacing, criminal damaging or endangering, criminal mischief and certain forms of telephone harassment whenever the crime is committed "by reason of" the race, color, religion, or national origin of the victim or group of victims. This provision acts as a penalty enhancer because ethnic intimidation is "an offense of the next higher degree" than that for the predicate offense.

B. The Illinois, Wisconsin, And Ohio Hate-Crime Statutes Differ Fundamentally From The Law Invalidated In *R.A.V. v. St. Paul.*

The Illinois, Wisconsin, and Ohio hate-crime statutes do not concern expression of ideas. They are a wholly different species from the St. Paul, Minnesota ordinance struck down in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), a content-based proscription on speech.

The language of the Illinois statute is about *crime* and its victims: "A person commits hate crime when, by reason of [specified characteristics of another individual], he commits [an underlying offense]." Ill. Rev. Stat. ch. 38, par. 12-7.1(a). The language of the St. Paul ordinance, by contrast, is about *speech* and its effects:

> Whoever places on public or private property a *symbol*, object, *appellation*, *characterization* or *graffiti*

> . . . which one knows or has reasonable grounds to know *arouses anger, alarm or resentment in others* on the basis of race, color, creed, religion or gender commits disorderly conduct . . . .

St. Paul, Minn. Legis. Code Sec. 292.02 (1990) (emphasis added). Beyond the clear language, the Minnesota Supreme Court construed the ordinance as *limited* to a category of *speech*—fighting words. *See R.A.V.*, 112 S. Ct. at 2542.

From this starting point all else in *R.A.V.* follows, without relevance to statutes which do not concern a category of speech. *R.A.V.* holds that the general exclusion of a category of speech like "fighting words" from First Amendment protection does not permit content-based regulation within the category of speech. This holding does not pertain to a statute concerning targeted predicate crimes.

C. No First Amendment Interest Is Implicated By The Illinois, Wisconsin, And Ohio Hate-Crime Statutes.

Unlike in Minnesota, the Illinois, Wisconsin, and Ohio hate crimes statutes do not involve a category of speech, protected or generally unprotected by the First Amendment, or the effect of speech on listeners. Rather, they target longstanding criminal acts unrelated to constitutional provisions for freedom of speech, such as criminal trespass to vehicle and misdemeanor theft, committed because of the status of group members within our society.

The underlying criminal acts are not speech. If committing a crime were considered protected constitutional expression, all law enforcement would be unconstitutional. *Any* criminal act could be said to express some idea, such as frustration, anger, or disrespect. The thief communicates "I want what you have." The First Amendment does not cover criminal conduct under the guise of expression.

While the Illinois and St. Paul laws similarly address acts committed "on the basis of" various characteristics (St. Paul) and "by reason of" various characteristics (Illinois), this aspect played no part in the *R.A.V.* analysis until it was determined that the predicate conduct was a form of speech. As Professor Laurence H. Tribe stated in congressional testimony concerning the proposed federal hate crimes act, "the trigger for enhanced punishment . . . differs completely from the constitutionally problematic trigger for punishment under the St. Paul ordinance struck down by the Supreme Court in the *R.A.V.* case." Statement of Laurence H. Tribe on H.R. 4797, the "Hate Crimes Sentencing Enhancement Act of 1992" at 2.

The targeting of otherwise non-speech *crime* committed "by reason of" the status of the victim does not transform crime into speech, nor does it prefer expression of certain *ideas* over others. Rather, it recognizes the greater harm done by criminals who physically select and victimize those with the specified characteristics. The bigot can shoot verbal arrows freely so long as the arrows do not take the form of predicate crimes. The statute punishes particularly harmful crime, not particularly disfavored speech.

D. Greater Harms Deserve Greater Penalties.

Hate crime statutes in Illinois, Wisconsin, and Ohio punish the greater harm caused to the victim, the group, and society as a whole than where a victim is selected randomly or based on private relationships. Because the crime is more harmful, there is a rational basis for legislation of separate or greater punishment.

Hate crimes subject particular victims to the humiliation of knowing that they have been selected because of

immutable or core characteristics. Beyond the individual victim, hate crimes intimidate an entire community left to feel vulnerable and fearful. The implication to each member of the community is that he or she may be the next victim. This often causes criminal acts to "escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11, 13 (1984). Ultimately, hate crimes damage the fabric of our entire society as they attempt to unravel the opportunities of group members to participate freely in the greater community.

Crimes causing greater harms warrant greater penalties. Specifically, there is nothing novel about increasing punishment for crimes that are particularly harmful because of the status of the victim. Illinois statutes criminalize or increase the classification of certain crimes committed against members of groups such as children or the elderly, *see e.g.* Ill. Rev. Stat. ch. 38, pars. 12-4.3 and 4.6 (aggravated battery of a child or elderly person); Ill. Rev. Stat. ch. 38, pars. 12-14(a)(5) and (b) (aggravated criminal sexual assault of elderly person or minor); disabled individuals, *see e.g.*, *id.* par. 12-14(a)(6) (aggravated criminal sexual assault of a physically handicapped person); Ill. Rev. Stat. ch. 38, par. 65-1 (denial of use of public accommodations to blind persons); and police officers, *see e.g.* Ill. Rev. Stat. ch. 38, par. 9-1(b)(1) (murder of police officer is aggravating factor). Moreover, the Illinois sentencing code permits enhanced penalties where a crime victim is over sixty years old, *see* Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(8), or handicapped, *see id.* at par. 1005-5.3.2(9). These crimes and increased penalties properly reflect the degree of harm done to society when a criminal preys on members of particular groups.

Illinois has a legitimate interest in securing the rights of all people to participate in a tolerant society; to exchange beliefs and ideas, live where they like, school their children where they choose, work where their talents lead them, and generally live free from fear of criminal retaliation because of their inherent or core characteristics. As this Court wrote in *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941):

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuse. The authority of a municipality to impose regulations in order to assure the safety . . . of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

Targeted criminal acts have no place in the marketplace of ideas; indeed, they prevent it from serving as a forum open to all.

E. The Hate-Crime Statutes Do Not Punish Motive.

It is a fallacy to assume that hate crimes statutes punish motive. The "by reason of" language of the Illinois statute does not punish motive. The statute is not concerned with what prompts an offender to target a group member as a crime victim. A person could not be prosecuted for having bigoted *thoughts*, even thoughts about victimizing someone within a certain group. Rather, the statute operates when an offender acts upon such thoughts and commits a crime.

The language of the statute could just as well prohibit the commission of the predicate crimes against a member

of the specified groups "with the intent to commit the crime against a member of such group." Given that this wording would achieve the full objective of the statute, it is clear that motive is not at issue. Intentional physical selection of vulnerable victims is.

The Wisconsin statute is indeed worded in terms of intent. Yet the Wisconsin Supreme Court assumed that the legislature's concern was motive, not intent. *See Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807, 812 (1992). This assumption reflects the erroneous belief of the court that the only difference between the underlying crimes and the hate crime is the motive or reason for commission of the former. *See id.* at 812-13. In fact, the real difference is the targeted assault based on group status. The Wisconsin court could not be more wrong in concluding that the hate crime statute enhances punishment for individuals "because they are bigoted." *Id.* at 814. The bigot is free to think or say what he or she will about others. Each of us must accept the right of others to say what they think. Choosing an individual for crime victimization, however, is no longer a thought or expression but an act. A person need not live in fear of crime because of some characteristics shared by a larger group. "No person is subject to punishment under the [Oregon] Intimidation Law merely for holding or expressing opinions that are inimical to others because of their race, color, religion, national origin or sexual orientation. The focus of the statute is to forbid a result: physical injury." *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115, 1119 (1991).

The thought process inherent in intentional selection of a victim is not protected speech. Virtually the entire Illinois criminal code, as in other jurisdictions, relies on proof of intent (indeed, this element of proof operates for the

protection of those who commit acts without *mens rea*). With specific intent crimes, the State must prove that an individual does an act with a further object.[7] Under each of these statutes, the State must prove beyond a reasonable doubt the thought process of the offender in committing one act with a further purpose in mind. Similarly, when one intentionally commits a predicate crime against a particularly vulnerable victim, regardless of the motivation, the State can prosecute accordingly.

F. Penalizing Criminal Motivation Does Not Penalize Expression.

Even if hate-crime statutes were concerned with motive, the First Amendment does not protect motives for the commission of crimes. Judges routinely consider motives in determining appropriate sentences. It would offend our sense of justice to think that severity of sentences could not reflect the difference between benign and malevolent motives. A sentence should reflect, for instance, the difference between crimes committed out of need and greed. Motive is relevant to the offender's culpability and rehabilitative potential.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), this Court determined

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[7] Examples include burglary, Ill. Rev. Stat. ch. 38, par. 19-1 (entering with intent to commit a felony); forgery, Ill. Rev. Stat. ch. 38, par. 17-3 (making a document with intent to defraud); obstruction of justice, Ill. Rev. Stat. ch. 38, par. 31-4 (committing various acts with intent to prevent apprehension or obstruct prosecution); solicitation, Ill. Rev. Stat. ch. 38, par. 8-1 (encouraging another with intent that an offense be committed); conspiracy, Ill. Rev. Stat. ch. 38, par. 8-2 (agreeing with another with intent that offense be committed); and arson for fraud, Ill. Rev. Stat. ch. 38, par. 20-1(b) (damaging property with intent to defraud insurer).

that motivation such as racial hatred is appropriate sentencing aggravation where relevant to commission of the crime. *Dawson* and *Barclay* dispose of the claim that the First Amendment protects criminal motives, even with regard to matters such as race. The Wisconsin Court proves as much by nonsensically conceding that "of course" it is proper as in *Dawson* to consider evil motives in punishing, while claiming that it is different and improper to create a "separate enhancer" for the same evil motive. *See Mitchell*, 485 N.W.2d at 815 n.17. Since the Constitution is not offended when judges consider motive, it cannot be offended by legislation of the same consideration.

G. The Hate-Crime Statute Is Only A Legitimate Extension Of Anti-Discrimination Laws.

The numerous criminal and civil anti-discrimination statutes in Illinois, as in federal law, are precisely analogous to the hate crime statutes in prohibiting actions committed "because of" characteristics of the victim where such targeted actions cause particularly undesirable harms.[8] The acts underlying federal and state anti-discrimination laws, such as hiring and firing, are not inherently objectionable or discriminatory. What is sanctioned is the selection of a particular individual because of group status. In disparate treatment law, employers are free to perform these acts with impunity *absent discriminatory motive.* Disparate treatment is unlawful for precisely the reason that hate crimes are: the selection of a target from within a protected class. The cases identify *motive* as the issue. " 'Under the *disparate treatment* theory, proof of a discriminatory motive is critical. . . .' (*International Brotherhood of Teamsters v. United States* (1977), 431 U.S. 324, 335 n.15. . . .)" *Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265, 269 (1990).[9] Just as targeting of victims properly transforms lawful acts into prohibited acts, so it transforms lesser crimes into greater crimes. Reversal in this case will remove the cloud unnecessarily hanging over all anti-discrimination laws.

[8] Illinois laws prohibit "unlawful discrimination," defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service," Ill. Rev. Stat. ch. 68, par. 1-103(Q), in areas such as employment, *see id.* par. 2-102; real estate transactions, *id.* par. 3-102; financial institution loans, *see id.* par. 4-102; issuance of credit cards, *see id.* par. 4-103; and denial of enjoyment of public accommodations, *see id.* par. 5-102. Criminal sanctions apply to certain unlawful discrimination such as in the sale and purchase of real estate, *see* Ill. Rev. Stat. ch. 38, par. 70-51, and the interference with participation in educational activities of a child afflicted with a chronic infectious disease, *see* Ill. Rev. Stat. ch. 38, par. 12-7.2.

H. Freedom Of Speech Does Not Preclude Use Of Speech As Evidence Of Crime.

Use of an offender's words or associations as evidence of guilt is not only constitutional but a principal means of obtaining convictions in many criminal trials. This Court should review this case to correct the alarming misimpression that any resulting "chilling effect" creates a constitutional barrier to use of speech as evidence.

This Court in *Dawson* found that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected

[9] Illinois anti-discrimination law follows the law applicable to federal claims under Title VII. *See Board of Trustees v. Knight*, 163 Ill. App. 3d 289, 294, 516 N.E.2d 991 (1987).

by the First Amendment." 112 S. Ct. at 1097. Where a crime is one of racial hatred, such evidence is relevant aggravation. *See id.* at 1098-99.

The rules of evidence allow the use of a defendant's relevant statements before, during, or after commission of a crime as proof of any element of the crime. "I hate Joe and want to kill him," "This is the end, Joe," and "I confess I killed Joe" are classic evidentiary components. If the First Amendment prohibited use of a person's speech as evidence, the Fifth Amendment's more narrow preclusion of compelled self-incrimination would be superfluous. There is no basis for reading the First Amendment as a prohibition on self-incrimination uncompelled by the State.

CONCLUSION

The decisions of the Wisconsin and Ohio Supreme Courts are wrong on their own terms and in their potential application to hate-crime statutes like that in Illinois. Furthermore, if uncorrected, the erroneous reasoning of the decisions will support time-consuming, unwarranted attacks on much of the criminal code and rules of evidence in criminal proceedings and the entire body of anti-discrimination laws. To demonstrate the limited scope of this Court's ruling in *R.A.V.*, and to curtail the piecemeal challenges sure to come based on these state court decisions, the People of Cook County, Illinois respectfully ask this Court to grant certiorari and reverse the judgments in these cases.

Respectfully submitted,

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MOTION FILED
OCT 26 1992

(4) (4)

Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner*,
v.
TODD MITCHELL, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner*,
v.
DAVID WYANT, *Respondent*.

STATE OF OHIO, *Petitioner*,
v.
JAMES MAY, JR., et al., *Respondents*.

STATE OF OHIO, *Petitioner*,
v.
CLANCY VAN GUNDY, et al., *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Chicago Lawyers' Committee") moves this Court for leave to file the attached brief *amicus curiae* in support of the petitions for writs of certiorari. The written consent of petitioner State of Wisconsin and respondent Todd Mitchell in no. 92-515 has been obtained and filed with the Clerk of this Court. The written consent of petitioner State of Ohio and respondents David Wyant and Robert Blazer in no. 92-568 has been obtained and filed with the Clerk of this Court. The written consent of the remaining respondents in no. 92-568 has been requested but not obtained.

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims. Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned.

The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois. Accordingly, the Chicago Lawyers' Committee requests that this Court grant it leave to file the attached brief *amicus curiae* supporting the petitions for writs of certiorari.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims.

Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned. The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois.

REASONS FOR GRANTING THE WRITS

I. The Decisions of the Wisconsin and Ohio Supreme Courts Are Inconsistent with Two Recent Decisions of This Court.

The Wisconsin and Ohio Supreme Courts struck down their respective states' bias violence statutes on the grounds that they violated the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992); *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). But the First Amendment is not even implicated in, much less violated by, the Wisconsin and Ohio bias violence statutes.

The Wisconsin statute authorizes the imposition of increased maximum penalties if the person committing the crime "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ." Wis. Stat § 939.645(1)(b). The Ohio bias violence statute enhances the penalty for a person who commits a crime "by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code § 2927.12. In both statutes, discriminatory selection of the victim—selection based on the victim's status—is the essential element of the crimes. In neither statute is expression—either speech or expressive conduct—an element of the crime at all.

The decisions of the Wisconsin and Ohio Supreme Courts are directly contrary to this Court's decision last term in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). In *R.A.V.*, this Court clearly stated: "When a government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. The St. Paul, Minnesota

ordinance at issue in *R.A.V.* was, by its terms, directed at the content of expression. Indeed, it regulated expression based upon the viewpoint contained in the message. In contrast, both the Wisconsin and the Ohio statutes regulate conduct without regard to expression. At most, any impact on speech is incidental. And clearly "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The Wisconsin and Ohio bias violence statutes do not in any way restrict the ability of a person to believe anything or to hate anyone; they simply punish committing a crime against someone because of that person's status.

The decisions of the Wisconsin and Ohio Supreme Courts are also inconsistent with this Court's decision last term in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, this Court clearly held that the Constitution does not preclude the admission of relevant evidence "concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. *See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding admission of evidence of racial animus in capital sentencing proceeding). There is no logical or legal basis for allowing a judge or jury to consider discriminatory victim selection in determining the imposition of criminal penalties while forbidding a legislature from doing so.

In short, the decisions of the Wisconsin and Ohio Supreme Courts are based on a seriously erroneous reading of the limits imposed by the First Amendment and are inconsistent with this Court's recent decisions in *R.A.V.* and *Dawson*.

II. The Decisions of the Wisconsin and Ohio Supreme Courts, If Followed, Would Erroneously Invalidate All Other Bias Violence Statutes in This Nation and Call Into Question the Validity of Federal and State Antidiscrimination Statutes.

Nearly every state in this nation has enacted some form of bias violence statute. Anti-Defamation League of B'nai B'rith, *ADL Law Report, Hate Crimes Statutes: A 1991 Status Report* 22-23. Moreover, many states (including Wisconsin, Ohio, and Illinois) provide victims of bias violence with a civil remedy. *Id.* The decisions of the Wisconsin and Ohio Supreme Courts striking down their respective states' bias violence statutes are so broad that, if followed, they would invalidate all other bias violence statutes in this nation.

In addition, the operative language of both federal and state antidiscrimination statutes is the same as or substantially similar to the operative language in the Wisconsin and Ohio bias violence statutes. Because there is no principled distinction between antidiscrimination statutes and the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, these decisions call into question the validity of antidiscrimination laws throughout our nation.

III. There Is a Conflict Between State Courts of Last Resort Concerning the Constitutionality of Bias Violence Statutes.

The Oregon Supreme Court has upheld the constitutionality of Oregon's bias violence statute, specifically rejecting the reasoning adopted by a majority of the Wisconsin Supreme Court in *Mitchell. State v. Plowman*, 314 Or. 157, 1992 WL 207677 (August 27, 1992). The different results reached by the Wisconsin and Ohio Supreme Courts

on the one hand and by the Oregon Supreme Court on the other appear to be based on their differing readings of this Court's decision last term in *R.A.V.* Because of the importance of the issues involved, this Court should resolve the conflict.

CONCLUSION

Nothing threatens to unravel the fabric of our heterogeneous society more than violence directed at persons because of immutable characteristics such as their race or religion. Yet, under the mistaken belief that the First Amendment prevents the states from providing a remedy for bias violence, the Wisconsin and Ohio Supreme Courts have struck down statutes that provide such a remedy. This Court should grant the petitions for writs of certiorari to make clear that the First Amendment does not bar the states from providing a remedy for bias violence.

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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

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Supreme Court of the United States
October Term, 1992

STATE OF WISCONSIN,

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

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Relevant Docket Entries

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10/9/90	Decision of trial court rejecting constitutional challenge
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Wisconsin Court of Appeals

1/25/91	Brief of defendant-appellant filed
2/28/91	Brief of state filed
6/5/91	Decision of court upholding constitutionality of penalty enhancement statute issued

Wisconsin Supreme Court

7/3/91	Petition asking Wisconsin Supreme Court to review the decision of the court of appeals filed by defendant
7/17/91	Response to petition filed by state
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9/23/91 Brief of defendant-petitioner filed

10/14/91 Brief of state filed

6/23/92 Decision of Wisconsin Supreme Court striking down the penalty enhancement statute as unconstitutional issued

Transcript Of Jury Instructions Read To Jury Defining The Underlying Crime And The Wisconsin Penalty Enhancer

Count one of the information alleges that at the City and County of Kenosha, on October 7, 1989, in concert with another, the defendant did cause great bodily harm to another, to wit, Gregory Reddick, a minor, d.o.b., 1/25/75, by an act done with intent to cause great bodily harm to that person and without the consent of Gregory Reddick, and further, that said defendant intentionally selected the person against whom said crime was committed, to wit, Gregory Reddick, because of the race of Gregory Reddick. Said conduct by the defendant is alleged to be contrary to Section 939.05, 940.19(2) and 939.645(2) (c) of the Wisconsin Statutes. To this charge the defendant has entered a plea of not guilty, which means of denial of every material allegation in this count one of the information.

Count two of the information alleges that, again, at the City and County of Kenosha, on October 7, 1989, in concert with another, the defendant did intentionally take and carry away the movable property of another, namely, a pair of British Knights tennis shoes belonging to Gregory Reddick, without his consent and with intent to deprive Gregory Reddick permanently of possession of said property. Said property being taken from the person of another, namely, Gregory Reddick, and further, said defendant intentionally selected the person against whom said crime was committed, namely, Gregory Reddick, because of the race of Gregory Reddick. Said conduct by the defendant alleged to be contrary to Section 939.05, 943.20(1)(a)(3)(d)(2) and 939.64 5 (2)(c) of the Wisconsin Statutes. To this charge the defendant has also entered a plea of not guilty, which means a denial of every material allegation to count two of the information.

A person is a party to a crime when they are concerned in the commission of the crime. Sec. 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged and convicted of the commission of the crime, although he or she did not directly commit such crime as may be applicable in this case. A person is concerned in the commission of a crime if he or she, (a) directly commits the crime or, (b), intentionally aids and abets the commission of it, or, (c) is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuant of the intended crime and which, under the circumstances is a natural and probable consequence of the intended crime. However, such a party is not concerned in the commission of a crime if he or she voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of a crime, so as to allow the others also to withdraw. The person who directly commits the crime is called the principal. A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intending to commit a crime. He or she knowingly either renders aid to the person who commits the crime, or is able, willing and ready to render aid if needed, and the person who commits the crime knows of his or her willingness to aid the principal. In order for you to better understand what the elements of aiding and abetting are, you should know that a person aids and abets when he or she undertakes conduct which either is verbal or overt action, which as a matter of objective fact aids another person in the execution of a crime, and further, he or she consciously desires or intends that his or her conduct will yield such assistance. It is not necessary that the aider and abettor enters into an

agreement with the person who directly commits the crime, nor is it necessary that the aider and abettor shares the specific intent required for the commission of the substantive offense he or she aids or abets. The mere intention to assist, should it become necessary if there is a preconcert between the aider and abetor, and the person who directly commits the crime, and if the latter has knowledge of such willingness, will constitute aiding and abetting. A person does not aid and abet if he or she is only a bystander or a spectator, innocent of any unlawful intent and does nothing to assist or encourage the commission of a crime. If a person intentionally aids and abets in the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

A party to a conspiracy is one who with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime. A mere understanding of expressed or unexpressed between two or more persons that they will commit a crime is all that is essential to constitute a conspiracy. Thus, it is not necessary that the conspirators had any express or formal agreement, or that there was a meeting of them or even that there was distinctly stated the precise things to be accomplished or the plan for it's accomplishment, either in a general way or in a detailed way by any member of the conspiracy to any other member. It is sufficient to constitute conspiracy if there is a meeting of the minds. This is a mutual understanding to accomplish some common criminal objectives, to work together for a common criminal purpose. If a person is a party to a conspiracy with others to commit a crime, and that crime is committed by a member of the conspiracy, then that person is guilty of the crime as well as the person who directly committed it. If a person is a party to a conspiracy with others to commit a crime, and if during that pursuance of such intended crime, another crime is committed by

such other or others, and under the circumstances the crime committed is a natural and probable consequence of the intended crime, then that person who is a party to the conspiracy is guilty of the crime actually committed, as well as the person who directly committed it. However, if a person voluntarily changes his or her mind and no longer desires the commission of the crime and notifies the other parties to the conspiracy of his or her withdrawal within a reasonable time before the commission of the crime, so as to allow such other parties also to withdraw, he or she is not to be held accountable for the acts of such other or others and cannot be convicted of any crime committed by such other or others after such timely notice of withdrawal.

The State must prove by evidence that satisfies you beyond a reasonable doubt that a defendant charged with the commission of an offense as party to the crime either directly committed the crime or aided and abetted the crime or conspiracy with others with the intent that a crime be committed. The State is not required to convict other participants in the crime or establish identity of the person who directly committed the crime. You, the jury, do not have to unanimously agree on the manner in which a defendant participated in the commission of the underlying offense, whether by directly committing the offense or aiding and abetting the commission of the offense, or conspiring with intent that a crime be committed. It is your task as a jury to first determine whether a person directly committed the crime as charged in each count of the information; then, secondly, you are to determine whether the defendant charged as party to the crime was concerned with the commission of that crime as defined for you.

I will first define the substantive offense then of aggravated battery as charged in count one of the information. Aggravated battery as defined in Section 940.19(2) of the Criminal Code of Wisconsin is

committed by one who intentionally causes great bodily harm to another by act done with intent to cause such harm to that person or another. Before a defendant may be found guilty of aggravated battery, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:

First, that Gregory Reddick suffered great bodily harm. Second, that a defendant committed an act which caused great bodily harm to Gregory Reddick. Third, that a defendant intended to cause great bodily harm to Gregory Reddick.

The first element of this offense requires that Gregory Reddick suffered great bodily harm. Great bodily harm means serious bodily injury, injuries which create high probability of death or which causes serious permanent disfigurement or which causes permanent or protracted loss or the impairment of the function of any bodily member or organ or other serious injury is great bodily harm.

The second element of this offense requires that the relation of cause and effect exists between the great bodily harm suffered by Gregory Reddick if he suffered such harm, and the act of the defendant; that is, an act of a principal. This requires that the act of the principal was a substantial factor in producing the great bodily harm; that is, it was a factor that had substantial effect in producing the great bodily harm as a natural result.

The third element of this offense requires that the principal intended to cause great bodily harm to Gregory Reddick. The phrase intent to cause great bodily harm means the mental purpose to cause great bodily harm to another human being. Intent to cause bodily harm must be found as a fact before you can find the principal guilty. You cannot look into a person's mind to find out

his intent. You may determine such intent directly or indirectly from all the facts and evidence concerning this offense. You may consider any statements or conduct of the principal which indicates his or her state of mind. You may find intent to do great bodily harm from such statement or conduct, but you are not required to do so.

You are the sole judges of the facts, and must not find a principal guilty unless you would be satisfied beyond a reasonable doubt that the principal intended to do great bodily harm. If you are satisfied beyond a reasonable doubt from the evidence in the case that the principal did commit an act which causes great bodily harm to Gregory Reddick, and that the defendant -- I'm sorry -- and that the principal acted with the purpose to cause great bodily harm to Gregory Reddick, then you would find the defendant guilty. If you find that he is a party concerned; that is, he engaged or was engaged as a party to the crime of aggravated battery, as charged in count one of the information, then you must find the defendant guilty. If you are not so satisfied, then you must find the defendant not guilty of aggravated battery as charged in count one of the information.

The defendant has entered a plea of not guilty, which means a denial of every material allegation in count one of the information. You should make every reasonable effort to agree unanimously on your verdict on the charge of being party to the crime of aggravated battery as charged in count one of the information. Before considering the offense of being party to the crime of intermediate battery; however, if after a full and complete consideration of the evidence you conclude that further deliberation would not result in unanimous agreement in the charge of being party to the crime of aggravated battery, you should consider if the defendant is guilty of intermediate battery. You are not, in any event to find the defendant guilty of more than one of

the foregoing offenses; that is, the aggravated battery as charged in count one or intermediate battery.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed the crime of being party to the crime of aggravated battery as charged in count one, you should find him guilty of that offense, and you must not find him guilty of the lesser included offense that I will now submit to you. If you are not satisfied beyond a reasonable doubt in the evidence in this case that the defendant committed either of the offenses I will submit to you you -- that is, as to each count, under count one as to either charge, under count one of the information, you then -- you must find the defendant not guilty. Intermediate battery I will now define for you. Intermediate battery as defined under 940.19(1m) under the Criminal Code of Wisconsin is committed by one who causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed. That is, the difference between aggravated battery and intermediate battery, that is, not the intent to cause great bodily harm, but with the intent to cause bodily harm. Before a defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present. First, that Gregory Reddick suffered great bodily harm. Second, that the principal committed an act which caused great bodily harm to Gregory Reddick. Third, that the principal intended to cause bodily harm to Gregory Reddick. Fourth, that such act was done without the consent of Gregory Reddick. Fifth, that the principal knew that Gregory Reddick had not consented to that act or the acts.

The first element of this offense requires that Gregory Reddick suffered great bodily harm. Great bodily harm means serious bodily injury, injury which creates a high

probability of death, or which causes a serious permanent disfigurement or which causes a permanent or protracted loss of the functions or any bodily member or organ or other serious bodily injury is great bodily harm. The second element of this offense requires that the relation of cause and effect exists between the great bodily harm suffered by Gregory Reddick, if he suffered such harm, and the act of the principal. This requires that the act of the principal was a substantial factor in producing the great bodily harm; that is it was a factor which had substantial effect in producing the great bodily harm as a natural result. The third element of this offense requires that the principal intended to cause bodily harm to Gregory Reddick.

Under the Criminal Code, bodily harm means physical pain or injury, illness or any impairment of physical condition. The phrase intent to cause bodily harm means the mental purpose to cause bodily harm to another human being. The intent to cause bodily harm must exist at the time of the act causing great bodily harm. Intent to cause great bodily harm must be found as a fact before a principal may be found guilty.

You cannot look into a person's mind to find out his or her intent. You may determine such intent directly or indirectly from all the facts and evidence concerning the offense. You may consider statements or conduct of the principal which indicate his or her state of mind. You may find intent to cause bodily harm from such statement or conduct, but you are not required to do so.

You are the sole judges of the facts, and you must not find the defendant guilty; that is, a principal guilty of this offense unless you are satisfied beyond a reasonable doubt that the principal intended to cause bodily harm.

The fourth element of this offense requires that the act causing the great bodily harm was done without the

consent of Gregory Reddick. Under the Criminal Code, the phrase without consent means there was no consent in fact. The fifth element of this offense requires that the principal knew that Gregory Reddick did not consent to the commission of the act which caused the great bodily harm.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the principal did commit an act which caused great bodily harm to Gregory Reddick without Gregory Reddick's consent, that the principal acted with the purpose to cause great bodily harm to Gregory Reddick, that the principal knew that Gregory Reddick did not consent to the act, and you find that the defendant here was a party to the crime, then you should find the defendant guilty of the intermediate battery as defined for you as a lesser included offense of aggravated battery. If you are not so satisfied, then you must find the defendant not guilty.

The information alleges, not only that the defendant committed the crime of aggravated battery, but that he intentionally selected the person against whom the crime was committed because of the race of that person. If you find the defendant guilty of aggravated battery, you must answer the following question: Did the defendant intentionally select the person against whom the crime of aggravated battery was committed because of the race of that person? Before you may answer the question yes, you must be satisfied beyond a reasonable doubt that both of the following facts were established. First, that the defendant committed the crime of aggravated battery against Gregory Reddick as it has been defined for you. Second, that the defendant intentionally selected Gregory Reddick against whom the crime was committed because of the race of that person. This requires that the defendant knew that Gregory Reddick was a member of the white race and committed the crime of aggravated battery against him

for the reason that he was a member of that race. If you are satisfied beyond a reasonable doubt that the defendant committed the crime of aggravated battery against Gregory Reddick, and that he intentionally selected Gregory Reddick as the person against whom a crime was committed because of the race of Gregory Reddick, you should answer this question yes. If you are not so satisfied, you must answer the question no.

Transcript Of Verdicts As Read By Court

THE COURT: All right. Ladies and gentlemen, you may be seated. Have you reached a verdict?

JUROR: Yes.

THE COURT: Could you hand the verdict to the bailiff, and the bailiff will bring it up? All right. The jury has returned the substantive instructions. All right. As to count one then, the jury has returned the verdict in proper form. Verdict, we, the jury, find the defendant, Todd Mitchell, guilty as to count one of the information of the lesser included crime of being party to the crime of intermediate battery, in violation of Section 940.19 (1m) of the Wisconsin Statutes, committed at the time and place alleged in count one of the information; dated this 13th day of December, 1989. Foreperson, Paul Whitovich, and, question, did the defendant intentionally select the person against whom the crime of intermediate battery, in violation of Section 940.19(1m) was committed because of the race of that person; answer, yes; dated this 13th day of December, 1989, and Paul Whitovich, Foreperson. Ladies and gentlemen, or lady and gentlemen of the jury, was this and is this your verdict?

JURY: Yes.

THE COURT: So say you all?

JURY: Yes.

THE COURT: Then, as to count two, verdict, we, the jury, find the defendant, Todd Mitchell, guilty of being party to the crime of theft from a person as charged in count two of the information; dated this 13th day of December, 1989, Paul Whitovich, Foreperson. Did the

defendant intentionally select the person against whom the crime of theft from person was committed because of the race of that person? Answer, no. Dated this 13th day of December, 1989, Paul Whitovich, Foreperson. Ladies and gentlemen, was this and is this your verdict?

JURY: Yes.

THE COURT: So say you all?

JURY: Yes.

163 Wis. 2d 652
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL, Defendant-Appellant,
No. 90-2474-CR.
Court of Appeals

Submitted on briefs April 29, 1991.
Decided June 5, 1991.

(Also reported in 473 N.W.2d 1.)

APPEAL from judgments and an order of the circuit court for Kenosha county: JEROLD W. BREITENBACH, Judge. *Affirmed.*

On behalf of the defendant-appellant, the cause was submitted on the brief of *Bernard Goldstein of Goldstein & Kagen* of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of *James E. Doyle*, attorney general, and *Paul Lundsten*, assistant attorney general.

Before Nettesheim, P.J., Brown and Anderson, JJ.

BROWN, J. Todd Mitchell challenges the constitutionality of the "hate crimes" penalty enhancer law in Wisconsin, sec. 939.645, Stats., claiming that it is vague and overbroad and violates equal protection principles. We hold that the statute clearly gives persons of ordinary intelligence fair notice of the conduct prohibited, provides standards for those who enforce the laws, and does not "chill" citizens from exercising protected constitutional freedoms. Thus, the statute is

neither vague nor overbroad. We will not reach the equal protection issues because of waiver. We also discuss other nonconstitutional issues and affirm.

Gregory Reddick, a fourteen-year-old white male, was walking down a street near the Renault apartment building in Kenosha. He was wearing "British Knights" brand athletic shoes. Several black males rushed across the street at Reddick, knocked him to the ground, surrounded him, and beat him until he was unconscious. Police found him a short time later, still unconscious, and with his shoes missing. Reddick was severely injured; he was comatose for about four days; and his injuries might have been fatal had he not received medical treatment.

Testimony revealed the following facts about the beating and theft. A group of young black men and boys were gathered at the Renault apartment building on the evening of the incident. Mitchell, who was nineteen at the time, was one of the older members of the group. Some of the group were inside the apartment complex discussing the movie "Mississippi Burning;" in particular, they were talking about that part of the movie where a white man beat a young black boy who was praying. There was no evidence that Mitchell was involved in this discussion.

About ten members of the group that was inside moved outdoors. There, people were talking about the movie. Before the victim appeared, Mitchell said to the gathering, "Do you all feel hyped up to move on some white people?"

A short time later, Reddick approached on the other side of the street. Reddick said nothing provocative. Mitchell said, "You all want to fuck somebody up?" Then he said, "There goes a white boy; go get him." He

counted to three and pointed this way and that way, indicating that the group should surround Reddick.

Several persons in the group immediately took off running toward the white youth. Most ran directly at him. One person in the group kicked Reddick, knocking him to the ground. Several attackers then surrounded Reddick and repeatedly stomped, kicked and punched him. This lasted about five minutes. One of the attackers said he thought Reddick was dead.

One of the attackers returned from the beating possessing Reddick's "British Knights" shoes. He showed them to different people. Mitchell was in the area when the shoes were being shown.

Mitchell was convicted of aggravated battery, party to a crime, and the jury separately found that Mitchell intentionally selected the battery victim because of the victim's race, pursuant to sec. 939.645, Stats. Mitchell was also convicted of theft, party to a crime.

Mitchell's major challenge is to the constitutionality of sec. 939.645, Stats., dubbed the "hate crimes" statute. The constitutionality of a statute is a question of law which this court may review without deference to the trial court. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 733, 416 N.W.2d 883, 892 (1987). Here, there is not even a trial court opinion to review, as the constitutionality issues are raised for the first time on appeal. Nonetheless, challenges to the facial constitutionality of statutes are a matter of subject matter jurisdiction and, therefore, cannot be waived. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 536-39, 280 N.W.2d 316, 320-21 (Ct. App. 1979). The equal protection argument, however, is not a challenge to a facial constitutionality of the statute. We deem this specific argument waived and we will not address it.

Before addressing Mitchell's vagueness and overbreadth challenges to sec. 939.645, Stats., we briefly touch upon the burden he must carry. Generally, when a defendant challenges the constitutionality of a statute, he or she bears the heavy burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Dums*, 149 Wis. 2d 314, 319-20, 440 N.W.2d 814, 815-16 (Ct. App. 1989). The defendant must do this in light of the strong presumption favoring the constitutionality of the statute. *State v. Hurd*, 135 Wis. 2d 266, 271, 400 N.W.2d 42, 44 (Ct. App. 1986).

There is an exception to that rule. When a statute infringes on the exercise of first amendment rights, the burden of establishing its constitutionality is on its proponent. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Mitchell claims that the statute punishes activities protected by the first amendment. He therefore argues that the state has the burden in this case. For the reasons that follow, we disagree and impose the burden on Mitchell himself.

We first discuss the vagueness argument. Section 939.645, Stats., provides an increase in penalties for any person committing a crime under chs. 939 to 948, Stats., who, in addition:

> *Intentionally selects* the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the *race*, religion, *color*, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Section 939.645(1)(b), Stats. (emphasis added).

Mitchell points to two terms in the statute, "intentionally selects" and "race" as being undefined and

ambiguous. He claims two consequences result. First, that the statute fails to give proper notice of prohibited conduct. Second, that the statute encourages arbitrary or erratic convictions because there are no guidelines for prosecutors or police.

Mitchell's claims track the two-step process in determining vagueness claims. The steps are: (1) the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and (2) the statute must provide standards for those who enforce the laws and adjudicate guilt. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654, 662 (1989).

A legal principle to be kept in mind when analyzing a statute for vagueness is that the statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Hurd*, 135 Wis. 2d at 272, 400 N.W.2d at 45. For the statute to be unconstitutional, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714, 719 (1976).

It should be further noted that a defendant who plainly falls within the prohibited zone of a statute cannot mount a vagueness challenge by building a case for some hypothetical person who might lie outside the zone. *See id.* at 713, 247 N.W.2d at 719.

The first claim is that the terms "intentionally selects" and "race" are not defined in the statute and are incapable of clear understanding by an ordinary person. We do not agree. The word "intentionally" is defined in

the criminal code. Section 939.23(3), Stats., states in pertinent part:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Thus, the word "intentionally" means a purpose to do the things specified. It is easily defined.

The word "selects" is also easily defined. We find it difficult to believe that persons of ordinary intelligence would not understand what this word means. Even so, when undefined, nontechnical words are used in a statute, they are given their ordinary and accepted meaning which may be ascertained from a recognized dictionary. *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, 651 (1984). Webster defines "select" as "to take by preference from a number or group: pick out." *Webster's New Collegiate Dictionary* 1047 (1977). Therefore, the term "intentionally selects" means to purposely pick out.

Mitchell also argues that the word "race" is ambiguous. We construe his argument here to be that persons of ordinary intelligence do not know the difference between the term "race" and "color," another term used in the statute. We do not need to resort to a recognized dictionary to resolve this claim. Reddick was white and is of a different race and color than the attackers. The statute prohibits purposely picking out a person of race or color. Under either term, the law was violated. We do not understand, and Mitchell does not enlighten us, how he has standing to raise this

particular argument since his conduct plainly falls within the prohibited zone of the statute regardless of the literary difference between the terms "race" and "color." This issue is meritless and we discuss it no further.

Having determined that the term "intentionally selects" is easily defined, we turn to what we consider to be Mitchell's major argument regarding vagueness. Assuming that "intentionally selects" means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term "intentionally selects" is this: Any time an accused is a different race than the alleged victim, it can be viewed as a "hate crime" suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was "intentionally selected." Therefore, Mitchell argues that so long as the accused "knows" the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines.

We disagree. The operative term in the statute is not whether a person "intentionally selects" a victim. Most, if not all, criminals can be said to "intentionally select" their victims. Nor is the operative term whether that victim who is intentionally selected is of a different "race" or "color," for instance. The operative term is "because." If a person is selected *because* of race, color, disability, and the like, then the statute becomes operative. If a victim is of a different race, for instance, than the perpetrator, that fact alone will not allow the penalty enhancer to be used. Nor will it be enough that

the perpetrator "picked out" or "selected" a person of a different race. The key is whether the selection was *on account of* race. If there is proof of that, then the enhancer becomes operative.

Thus, the statute is not vague on its face. People of ordinary intelligence can read the statute and determine that if they intentionally select a victim who happens to be of a different race, for example, they will not be subject to an enhancer. However, if they select that victim *because of* race, they will be subject to it. This also provides a proper standard for prosecutors and police. They must have some evidence that the victim was selected because of race. The vagueness argument fails.

We next discuss overbreadth. A statute may be constitutionally overbroad if it intrudes on a substantial amount of constitutionally protected activity. Our supreme court explained overbreadth as follows:

> A statue [sic] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski v. Salamone, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987) (citations omitted).

Unlike a vagueness argument, an overbreadth challenge may include hypothetical speculation. Therefore, even if no "chilling effect" was present in the defendant's particular case, a defendant may still argue that the statute is overbroad because it chills the rights

of others. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452, 457-58 (1980). This is true when the alleged overbreadth implicates free speech rights. *See id.*

We agree with the state that Mitchell's overbreadth argument is "hard to follow." He appears to assert that the statute is overbroad because it punishes free speech. He seems to argue that slurs, epithets, derogatory and racial expressions are simply part of everyday human behavior and are protected free speech when not involved in the commission of a crime. He apparently argues that there is no good reason why this same free speech should not also be protected during the commission of a crime. He seems to reason that the statute is criminalizing speech just because the perpetrator exercises his or her freedom of speech at the same time as the commission of a crime. By allowing the state to use the defendant's verbal statements against him, the state thereby discourages free speech.

We disagree that there is an infirmity in the statute on overbreadth grounds. The statute is directed at the action of selecting a victim and not at speech. Section 939.645, Stats., does not impede or punish the right of persons to express themselves regarding race or any other status or group listed. Words, or even beliefs, are not punished here. What *is* punished is conduct. The words used by a defendant are merely circumstantial evidence that the defendant specially selected the victim because of race or for other reasons listed. *Cf. People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988).

Thus, evidence of the words uttered by a defendant are used no differently than they are in other criminal statutes. The words are simply probative as to an element of a crime. Here, Mitchell's words were evidence that he intentionally selected Reddick because of race. That is why Mitchell has the burden of proof in

this case instead of the state. The statute does not proscribe free speech. It is not a law limiting the time, place or manner of speech. It is a law proscribing certain conduct where words can be used as circumstantial evidence of such conduct.

Mitchell next asserts that his conviction for aiding and abetting the theft of the victim's shoes is not supported by the record. Primarily, he argues that there was no evidence showing his intent to commit a theft or participate in a theft. In particular, he reasons that, although the jury may infer that he incited a battery, they may not infer that he intended to encourage a theft. He asserts that the person who stole the shoes did so on his own and without any encouragement or aid from Mitchell.

We do not agree. The jury had evidence from which it could infer that Mitchell encouraged and directed people to "move on" and "fuck up" the victim. We agree with the state that this encouragement was general and not limited to inflicting injury. By encouraging and directing the persons who attacked, Mitchell assisted the criminal mischief. The resultant beating, leaving the victim incapacitated, was one natural and probable consequence of the encouragement. The theft of the shoes was another. Although Mitchell raises other arguments about the theft conviction, they are all variations of the same theme--that the encouragement was for the purposes of battery and must be separated from any act of theft since Mitchell did not intend for a theft to take place. However, we hold that the theft is a natural and probable consequence of his incitement, just as was the battery.[1]

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[1]One of Mitchell's arguments is that the trial court never instructed on the "natural and probable consequences." The record indicates that there was such an instruction given.

By the Court.--Judgments and order affirmed.

169 Wis. 2d 153
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL,
Defendant-Appellant-Petitioner.
Supreme Court

No. 90-2474-CR. Oral argument February 26, 1992.
Decided June 23, 1992

(Reversing and remanding
163 Wis. 2d 652, 473 N.W.2d 1
(Ct. App. 1991).)

(Also reported in 485 N.W.2d 807.)

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

For the defendant-appellant-petitioner there was a brief by *Bernard Goldstein*, Milwaukee and oral argument by *Bernard Goldstein*.

For the plaintiff-respondent the cause was argued by *Paul Lundsten*, assistant attorney general with whom on the brief was *James E. Doyle*.

Amicus Curiae brief was filed by *Lynn Adelman, Pamela Moorshead* and *Adelman, Adelman & Murray, S.C.*, Milwaukee, for The National Association of Criminal Defense Lawyers, The Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender.

Amicus curiae brief was filed by *Robert H. Friebert, Cordelia S. Munroe, Peter K. Rofes* and *Freibert, Finerty & St. John, S.C.*, Milwaukee and *Ruth L. Lansner, Steven M. Freeman, Michael A. Sandberg*, New York, New York for Anti-Defamation League of B'nai B'rith, The Milwaukee Jewish Council, The Wisconsin Jewish Conference, The Milwaukee Urban League, The Madison Urban League, Inc., The NAACP-Milwaukee Branch and The Madison Community United, Inc.

HEFFERNAN, CHIEF JUSTICE. This is a review of a published decision of the court of appeals, *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991), which affirmed judgments of the circuit court for Kenosha county, Jerold W. Breitenbach, Circuit Judge, adjudging Todd Mitchell guilty of aggravated battery, party to a crime, and adjudging that Mitchell intentionally selected the battery victim because of the victim's race in violation of the hate crimes penalty enhancer, sec. 939.645, Stats. Mitchell challenged the constitutionality of the sec. 939.645, Stats., on appeal, and the court of appeals held that the statute was constitutional. We conclude that the statute unconstitutionally infringes upon free speech, and reverse the decision of the court of appeals.

The sole issue before the court is the constitutionality of sec. 939.645, Stats., the "hate crimes" statute.[1]

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[1]At the time of Mitchell's crimes, sec. 939.645, Stats. 1989-90, provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime

Mitchell asserts that the statute on its face violates: (1) his right of free speech guaranteed by the First Amendment and (2) his right to due process and equal protection of the laws guaranteed by the Fourteenth Amendment. We hold that the statute violates the First Amendment and is thus unconstitutional.[2]

The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group.

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under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

[2]Because of our holding, we do not address Mitchell's Fourteenth Amendment vagueness and equal protection claims.

Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.

The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Sections 939.05 and 940.19(1m), Stats. The jury separately found that Mitchell intentionally selected Riddick as the battery victim because of Reddick's race. The aggravated battery conviction carried a maximum sentence of two years, secs. 940 19(1m) and 939.50(3)(e), Stats. Because the jury found that Mitchell selected Reddick because of Reddick's race, sec. 939.645(2)(c), Stats., increased the potential maximum sentence for aggravated battery to seven years. The trial court

sentenced Mitchell to four years for the aggravated battery.[3]

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crimes statute. On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crimes statute was neither vague nor overbroad. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). We granted Mitchell's petition for review on the issue of the constitutionality of the hate crimes statute, and now reverse.[4]

This case presents an issue which has spawned a growing debate in this country: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crimes statutes and some vigorously in

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[3]Mitchell was also convicted of theft, party to a crime, sec. 943.20(1)(a) and (3)(d)2, Stats. The circuit court imposed and stayed a four year sentence for the theft conviction and imposed a four year period of consecutive probation. The circuit court did not find that the theft violated the hate crimes statute. The court of appeals rejected Mitchell's challenges to the theft conviction, *Mitchell*, 163 Wis. 2d at 664-65, and that portion of the court of appeals decision is not before the court.

[4]*Amicus curiae* briefs were filed with the court on behalf of two separate coalitions: the National Association of Criminal Defense Lawyers, the Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender; and the Anti-Defamation League of B'nai B'rith, the Milwaukee Jewish Council, the Wisconsin Jewish Conference, the Milwaukee Urban League, the Madison Urban League, Inc., the NAACP--Milwaukee Branch, and the Madison Community United, Inc.

opposition.[5] Individuals and organizations traditionally allied behind the same agenda have separated on the issue of the legitimacy of hate crimes statutes. As one commentator noted:

> [T]he debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once.

Susan Gellman, 39 U.C.L.A. L. Rev. at 334 (emphasis in original).

Statistical sources indicate that incidents of all types of bias related crime are on the rise. Joseph M.

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[5]*See, e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333 (1991); and Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845 (1990). Similarly, numerous courts and commentators are currently struggling with the constitutional implications of college campus "hate speech" rules. *See, e.g., UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484; and Katherine T. Bartlett and Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 Duke L.J. 574.

Fernandez, *Bringing Hate Crime Into Focus--The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R.-C.L. L. Rev. 261 (1991); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845, 845-46 (1990). Between 1980 and 1986, three thousand incidents of bias related violence were documented. *Id.* at 846. The Anti-Defamation League of B'nai B'rith (ADL) reports that "[d]uring 1990 there were 1685 anti-Semitic incidents reported to the Anti-Defamation League from 40 states and the District of Columbia." 1990 Audit of Anti-Semitic Incidents, Anti-Defamation League of B'nai B'rith 1 (1990). This was the highest total ever reported in the twelve year history of the audit. *Id.* The National Gay and Lesbian Task Force reported 7031 incidents of anti-gay violence in 1989. Anti-Violence Project, National Gay and Lesbian Task Force (NGLTF), Anti-Gay Violence, Victimization and Defamation in 1989 (1990). *See also* Developments in the Law--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1541-42 (1989).

In response to the recent rise in hate crimes, the United States Congress enacted the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. The purpose of the Act is to establish a national data collection system for compilation of statistics concerning bias-related crimes. The Act requires the Attorney General to publish an annual summary of the findings. *See generally*, Fernandez, *supra*.

At the state level, the response to reports of bias related crime has been significant. Nearly every state in the country has enacted some form of hate crime legislation. *See* ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, Appendix C, pp. 24-26 (1991). The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the potential penalty for a criminal actor if the state proves that the actor

intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

The first step in reviewing a constitutional challenge to a statute is to determine which party bears the burden of proving its constitutionality or unconstitutionality. While the party challenging the statute ordinarily bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional, *Bachowski v. Salamone*, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987), the burden shifts to the proponent of the statute to establish its constitutionality when the statute encroaches upon First Amendment rights. *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991). Because the hate crimes statute punishes the defendant's biased thought, as discussed below, and thus encroaches upon First Amendment rights, the burden is upon the state to prove its constitutionality.

The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech.

The First Amendment of the United States Constitution states bluntly: "Congress shall make no law . . . abridging the freedom of speech."[6] The First Amendment protects not only speech but thought as well. "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of*

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[6]Article I, section 3 of the Wisconsin Constitution provides in equally sweeping language that "no laws shall be passed to restrain or abridge the liberty of speech."

Education, 431 U.S. 209, 234-35 (1977). Even more fundamentally, the constitution protects all speech and thought, regardless of how offensive it may be. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).[7] As Justice Holmes put it: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled*, *Girouard v. United States*, 328 U.S. 61 (1946).[8]

Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a

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[7]*See also R.A.V. v. City of St. Paul*, No. 90-7675, 1992 LEXIS 3863, at *9, --- U.S. --- (June 22, 1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. Rockford*, 408 U.S. 104, 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966); and *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

[8]As was said in a statement attributed to Voltaire, surely one of the philosophical ancestors of our American constitution: "I disapprove of what you say but I will defend to the death your right to say it."

victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

Construing the model hate crimes statute designed by the Anti-Defamation League of B'nai B'rith (ADL), upon which the Wisconsin hate crimes statute is apparently loosely based,[9] one author provides the following insightful analysis:

> Under the ADL model, a charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere in a state's criminal code. As those offenses are already punishable, all that remains is an additional penalty for the

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[9]The ADL model statute provides:

> A. A person commits the crime of intimidation if, *by reason of* the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
>
> B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, p. 4 (1991) (emphasis added). While the Wisconsin statute substitutes the phrase "because of" for "by reason of," it is clear that both statutes are concerned with the actor's reason or motive for acting.

> actor's *reasons* for his or her actions. The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield. Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts.

Susan Gellman, 39 U.C.L.A. L. Rev. 333, 363 (1991).[10]

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[10]*See also State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984). In *Beebe*, the Court of Appeals of Oregon interpreted an ethnic intimidation statute fashioned after the ADL model, ORS 166.155(1), and recognized that the statute punished motive:

> The statute does not offer more protection to any class of victims. Anyone may be a victim of bigotry. It is the defendant who classifies, and he does so by his *motive*. The statute distinguishes between acts of harassment which are *motivated by racial, ethnic or religious animus* and acts of harassment which are not so motivated.

Id. at 13 (emphasis added). In *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988), the court interpreted New York's hate crimes statute which prohibits persons from subjecting persons to physical contact "because of" their protected status. In that case, the court stated: "Section 240.30(3), both on its face and as applied in this case, regulates violent conduct, and physical intimidation, when committed intentionally *and because of racial, religious or ethnic prejudice*." *Id.* at 817 (emphasis added). Finally, in *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894, 896 (1991), the court upheld a conviction under Maryland's hate crimes statute, Md. Ann. Code art. 27,

Because all of the crimes under chs. 939 to 948, Stats., are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.

While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of offensive motive or thought.[11] The conduct of "selecting" is not

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§ 470A(b)(3) (Supp. 1990), in part because the defendant's conduct "overwhelmingly demonstrate[d] his actions were *motivated by racial animus*." (Emphasis added.)

[11]There seems to be considerable confusion regarding the meaning and effect of "motive" in criminal law. As Black's Law Dictionary 810 (6th ed. 1990) states in its definition of "intent":

> Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

This confusion is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" at pp. 197-198 as "a purpose to do the thing or cause the result specified," correctly recognizes at pp. 187-188 n.2 that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

In this case the crime was aggravated battery, and the necessary intent under sec. 940.19(1m), Stats., is an "intent to

akin to the conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a

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cause great bodily harm." Quite clearly, Mitchell's intent to cause great bodily harm to Reddick is distinct from his motive or reason for doing so. Criminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so.

As explained by Professor Gellman:

> "Motive," "intent," and "purpose" are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor's reason for acting, the "why" as opposed to the "what" of conduct. Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense.
>
> . . .
>
> The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same conduct, as compared to the effect (or lack thereof) of altering the motive. Continuing with the example of burglary, changing the *purpose* of the break-in changes the very nature of the act: if *A* broke into *B*'s house for the purpose of getting *A*'s own property (not a criminal purpose), the act of breaking in is simply breaking and entering or trespass, not burglary, even if *A*'s motive was identical (the desire to pay his debts). By contrast, changing *A*'s *motives*, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his *purpose* was that of committing the crime of theft in *B*'s house, does *not* change the nature of the act: it is still burglary.

Susan Gellman, 39 U.C.L.A. L. Rev. at 364-65 (emphasis in original). While the state speaks of the "intentional" aspect of the hate crimes statute, when the focus is on the "selects . . . because of" aspect of the law, it becomes clear that it is the actor's motive which is targeted and punished by the statute.

subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.[12]

In this case, Todd Mitchell selected Gregory Reddick because Reddick is white. Mitchell is black. The circumstantial evidence relied upon to prove that Mitchell selected Reddick "because" Reddick is white included Mitchell's speech--"Do you all feel hyped up to move on some white people?"--and his recent discussion

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[12]In fact, on May 13, 1992, the legislature amended sec. 939.645, Stats., to apply specifically where the selection is "in whole or in part because of the actor's belief or perception regarding" the victim's status "whether or not the actor's belief or perception was correct." 1991 Wis. Act 291. Sections 939.645(1)(b) and (4), Stats., currently provide (with the substantive changes highlighted):

> **(1)**(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) *in whole or in part* because of *the actor's belief or perception regarding* the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct*.
>
> **(4)** This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry *or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry* is required for a conviction for that crime.

Thus the legislature has removed any doubt that the aim of the statute is the actor's subjective motivation. The dissenting opinions ignore this legislative clarification in their refusal to recognize that the statute is focused upon and punishes the defendant's motive.

with other black youths of a racially charged scene from the movie "Mississippi Burning." This evidence was used not merely to show the intentional selection of the victim, but was used to prove Mitchell's bigoted bias. The physical assault of Reddick is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's bigoted motivation for selecting Reddick, his thought which impelled him to act, is the reason that his punishment was enhanced. In Mitchell's case, that motivation was apparently a hatred of whites.[13]

The statute commendably is designed to punish--and thereby deter--racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech. The state would justify its transgression against the constitutional right of freedom of speech and thought because its motive is a good one, but the magnitude of the proposed incursion against the constitutional rights of all of us should no more be diminished for that good motive than should a crime be enhanced by a separate penalty because of a criminal's bad motive.[14]

The state admits that this case involves legislation that seeks to address bias related crime. The only

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[13]While the statute as written may extend to situations where the actor in fact is not biased, this does not save the statute. The legislature may not subvert a constitutional freedom--even one as opprobrious as the right to be a bigot--by carefully wording a statute to affect more than simply that freedom.

[14]As has long been recognized, the road to hell is paved with good intentions. See George Herbert, *Jacula Prudentum* (1640); Samuel Johnson, from James Boswell, *Life of Dr. Johnson* (1791); George Bernard Shaw, *Maxims for Revolutionists*; and others. Or as the latin poet Virgil said in the *Aeneid* in a reference to the slippery slope, "Facilis descensus Averno," which liberally translated means "Beware that first false step." Eugene Ehrlich, *Nil Desperandum* 107 (Guild Publishing 1987).

definition of "bias" relevant to this case is "prejudice." A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor--his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.[15]

In *R.A.V.*, *supra*, decided June 22, 1992, the United States Supreme Court held that a Minnesota ordinance prohibiting bias-motivated disorderly conduct[16] was

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[15]Of course, freedom of speech is not absolute. For example, the government may regulate or punish "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). Also, the government may regulate expressive conduct where there is an important governmental interest and the regulation is narrowly tailored to address that interest. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The bigoted thought which is punished by the hate crimes statute fits neither category. While an individual's bigoted speech may occasionally provoke retaliation, a person's thought will not. Nor is it argued that a hate crime is protected expressive conduct. It is not. Rather, a person's bigoted thought, the very thing punished by the hate crimes statute, is entitled to the full protection of the First Amendment.

[16]The ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990), provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

facially invalid under the First Amendment. Accepting the Minnesota Supreme Court's determination that the ordinance reached only expressions that constituted "fighting words" within the meaning of *Chaplinsky*, the Court held that the government may not constitutionally regulate even otherwise unprotected speech on the basis of hostility towards the idea expressed by the speaker. *R.A.V.*, 1992 U.S. LEXIS 3863, at *24-28. In other words, while the government may regulate all fighting words, it may not regulate only those fighting words with which it disagrees. Such a prohibition is nothing more than a governmental attempt to silence speech on the basis of its content. *Id.* at *26.

While the St. Paul ordinance invalidated in *R.A.V.* is clearly distinguishable from the hate crimes statute in that it regulates fighting words rather than merely the actor's biased motive, the Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees. The Court stated:

> [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at *32-33 (footnote omitted). The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance--racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content.

Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought.[17]

The hate crimes statute is also unconstitutionally overbroad. A statute is overbroad when it intrudes upon a substantial amount of constitutionally protected activity. Aside from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect upon free speech. As we explained in *Bachowski*:

> A [statute] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski, 139 Wis. 2d at 411 (citations omitted). The chilling effect need not be evident in the defendant's case; it is enough if hypothetical situations show that it will chill the rights of others. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). Finally, "[i]n

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[17]The dissent of Justice Bablitch asserts that punishing motive is permissible, based upon *Dawson v. Delaware*, 90-6704 (U.S. Supreme Court, March 9, 1992), wherein the United States Supreme Court indicated that evidence of a convicted murderer's bigoted motivation in committing the murder is a relevant inquiry in sentencing. Dissenting op. at 192-193. The dissent is wrong. Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

the First Amendment context, 'criminal statutes must be scrutinized with particular care . . ..'" *R.A.V.*, 1992 U.S. LEXIS 3863, at *63, (White, J., concurring), *citing Houston v. Hill*, 482 U.S. 451, 459 (1987).[18]

The state admits as it must that speech may often be used as circumstantial evidence to prove the actor's intentional selection. This case is a perfect example. Mitchell's speech is the primary evidence of his intentional selection of Reddick. The use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection, makes it apparent that the statute sweeps protected speech within its ambit and will chill free speech.

The criminal conduct involved in any crime giving rise to the hate crimes penalty enhancer is already punishable. Yet there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone--a misdemeanor--but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A intentionally selected B because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection

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[18]In *R.A.V.*, four Justices disagreed with the analysis of the majority, but concurred in the judgment because they concluded that the Minnesota ordinance is fatally overbroad because it "makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." *R.A.V.*, 1992 U.S. LEXIS 3863, at *58-64 (White, J., concurring).

threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.

And of course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech. As Professor Gellman explains:

> In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.
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> . . .
>
> It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the

> entire populace, not just to those who will eventually commit one of the underlying offenses.

Susan Gellman, 39 U.C.L.A. L. Rev. at 360-61 (emphasis in original) (citations omitted).[19]

Thus, the hate crimes statute is unconstitutionally overbroad because it sweeps protected First Amendment speech within its reach and thereby chills free speech.

Finally, we consider the argument advanced by the *amici curiae* ADL, et al., and embraced by the dissent that an analogy exists between the hate crimes statute and antidiscrimination laws, and that the numerous United States Supreme Court decisions upholding antidiscrimination laws lend support to the hate crimes statute.[20] We disagree.

Discrimination and bigotry are not the same thing. Under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the "selection" which is punished is not an act, it is a mental process. In this case, the act was the battery of Reddick; what was punished by the hate crimes statute was Mitchell's reason for selecting Reddick, his discriminatory motive.

As explained above, selection under the hate crimes statute is solely concerned with the subjective

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[19]*See, e.g, Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991) (fact that arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults and engaging in racial confrontations" supported conclusion that officer had probable cause to arrest).

[20]*See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Runyan v. McCrary*, 427 U.S. 160 (1976).

motivation of the actor. Prohibited acts of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and analogous state antidiscrimination statutes, such as refusal to hire, termination, etc., involve objective acts of discrimination. What is punished by the hate crimes penalty enhancer is a subjective mental process, not an objective act. The actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act.[21]

Finally, there is a difference between the civil penalties imposed under Title VII and other antidiscrimination statutes and the criminal penalties

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[21]The dissenting opinion of Justice Bablitch recites that it does not understand this "very complicated and elaborate distinction" between the hate crimes penalty enhancer and antidiscrimination statutes. That is interesting in light of the dissent's recognition at 200 that the statute applies to the defendant's "selection decision," an obviously subjective mental process. To state that a "decision" is analogous to the conduct proscribed by antidiscrimination statutes is untenable. We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

We repeat. The hate crimes statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. Taking the dissent's explanation that the statute is concerned with the "decision" of the defendant, it is clear that the hate crimes statute creates nothing more than a thought crime. Apparently that dissent is comfortable with such an Orwellian notion; we are not.

imposed by the hate crimes law, and contrary to the dissent's protestations, it is a difference that matters.[22] The difference is that while the First Amendment may countenance slight incursions into free speech where the overarching concern is protection from objective acts of bigotry in the employment marketplace and the adverse consequences of such acts on the civil rights of minorities, the First Amendment will not allow the outright criminalization of subjective bigoted thought. We have little doubt that an antidiscrimination statute which criminalized an employer's subjective discrimination, with nothing more, would be unconstitutional. This apparent schism in the First Amendment's protective shield is perhaps best understood in the context of overbreadth. A statute criminalizing the bigoted selection of a victim will chill free speech to a much greater extent than a statute imposing civil penalties for objective discriminatory acts.

In the wake of the Los Angeles riots sparked by the acquittal of four white police officers accused of illegally beating black motorist Rodney King, it is increasingly evident that racial antagonism and violence are as prevalent now as they ever have been. Indeed, added to the statistical compilation of bias related crimes could be the vicious beating of white truck driver Reginald Denny by black rioters, horrifyingly captured on film by a news helicopter. As disgraceful and deplorable as these and other hate crimes are, the personal prejudices of the attackers are protected by the First Amendment. The constitution may not embrace or encourage bigoted and hateful thoughts, but it surely protects them.

Because we wholeheartedly agree with the motivation of the legislature in its desire to suppress hate crimes,

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[22]*See* Bablitch, J., dissenting, at 187 n.2, 189 n.3, 191 and 192.

it is with great regret that we hold the hate crimes statute unconstitutional--and only because we believe that the greater evil is the suppression of freedom of speech for all of us.

By the Court.--The decision of the court of appeals is reversed and the cause remanded to the circuit court for resentencing on the aggravated battery conviction.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). Today, this court concludes that sec. 939.645, Stats. 1989-90, is unconstitutional, holding that it violates the First Amendment right to freedom of speech.[1]

The Constitution teaches mistrust of any government regulation of speech or expression. Had I been in the legislature, I do not believe I would have supported this statute because I do not think this statute will accomplish its goal. I would direct the state's efforts to protect people from invidious discrimination and intimidation into other channels. As a judge, however, after much vacillation, I conclude that this law should be construed narrowly and should be held constitutional.

This case presents a very difficult question involving the convergence of three competing societal values--freedom of speech, equal rights, and protection against crime.

Freedom of speech is the most treasured right in a free, democratic society. Our constitution protects our right to think, speak and write as we wish. This freedom of expression encompasses all speech, pleasant or unpleasant, popular or unpopular. Even expressions of bigotry are protected. Our constitutional history

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[1]1991 Wis. Act 291 is not before us.

makes clear that expression hostile to the values of our country should be addressed with more speech, not suppressed with police power.

Nevertheless, our law recognizes the harmful effects of invidious classification and discrimination. We acknowledge that when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone. In addition to the injury inflicted, the victim may suffer feelings of fear, shame, isolation and inability to enjoy the rights and opportunities that should be available to all persons. Furthermore, all members of the group to which the victim belongs may suffer when the individual is victimized. The state has determined that harms inflicted because of race, color, creed, religion or sexual orientation are more pressing public concerns than other harms. The state has legitimate, reasonable and neutral justifications for selective protection of certain people.[2] "In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed . . . it is compelling."[3] The state has a compelling interest in combating invidiously discriminatory conduct, even when the conduct is linked to viewpoints otherwise protected by the First Amendment.

In addition, our government has a compelling interest in preserving the peace, in protecting each person from crime and from the fear of crime.

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[2]*R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*67, *81-*82, Stevens, J., concurring).

[3]*R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*51, White, J., concurring).

Section 939.645 addresses only those crimes committed "because of" the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry." It does not punish all crimes committed by persons who have expressed bigoted beliefs. An individual may commit a criminal act. That same individual may possess or express bigoted beliefs. These two facts standing alone, however, do not subject that individual to punishment under sec. 939.645.

In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime.

Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Read narrowly as the legislature intended, this statute is a prohibition on conduct, not on belief or

expression. The statute does nothing more than assign consequences to invidiously discriminatory acts.

The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. Section 939.645 does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate directly to the commission of a crime.

The United States Supreme Court's recent decision in *R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992), has not persuaded me to the contrary. In *R.A.V.*, the Supreme Court held unconstitutional a St. Paul ordinance prohibiting placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . .." The majority opinion in *R.A.V.* ruled the ordinance facially unconstitutional because, even assuming that the ordinance only regulated "fighting words," the ordinance was based on the content of the ideas expressed by a defendant. The four concurring justices found the ordinance unconstitutional on the ground that the statute was an overbroad prohibition of fighting words.

R.A.V. does not control this case. Section 939.645 is not similar to the St. Paul ordinance; its validity does not rely on the "fighting words" doctrine. The defendant in *R.A.V.* was also charged under a state statute, sec. 609.2231(4), Minn. Stats. 1990, much more similar to sec. 939.645 than the St. Paul ordinance, but the defendant did not challenge that charge.

For the reasons set forth, I dissent.

WILLIAM A. BABLITCH, J. (*dissenting*).

> everywhere the crosses are burning, sharp-shooting goose-steppers around every corner, there are snipers in the schools . . . (I know you don't believe this. You think this is nothing but faddish exaggeration. But they are not shooting at you.)
>
> Lorna Dee Cervantes[1]

The law in question is not a "hate speech" law.

Nor is it really a "hate crimes" law as it has been somewhat inappropriately named.

It is a law against discrimination--discrimination in the selection of a crime victim.

Today the majority decides that the same Constitution which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime. Numerous federal and state laws exist which prohibit

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[1]Cervantes, Poem for the Young White Man Who Asked Me How I, An Intelligent Well Read Person Could Believe in the War Between Races, in M. Sanchez, Contemporary Chicana Poetry 90 (1986).

discrimination in the selection of who is to be hired, or fired, or promoted. No one seriously (at least until today) questions their constitutionality. Yet the majority today gives constitutional protection to discrimination in the selection of who is to be the victim of a crime. Both sets of laws involve discrimination, both involve victims, both involve action "because of" the victim's status.

The majority says there is a difference in the two types of laws. They are wrong. There is no support in law or logic for their position. How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

These are laws against discrimination, pure and simple. Dictionaries do not disagree on the meaning of the term discrimination: to distinguish, to differentiate, to act on the basis of prejudice. Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts "because of" the victim's protected status. These exact words appear in most, if not all antidiscrimination laws. These exact words appear in the laws before us today.

Yet the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In

its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest.

The majority rationalizes their conclusion by insisting that this statute punishes bigoted thought. Not so. The statute does not impede or punish the right of persons to have bigoted thoughts or to express themselves in a bigoted fashion or otherwise, regarding the race, religion, or other status of a person. It does attempt to limit the effects of bigotry. What the statute does punish is acting upon those thoughts. It punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them. The majority says otherwise. I disagree.

I conclude the statute in question is neither vague nor overbroad, nor does it offend equal protection. Accordingly, I dissent.

I.

Examples of shocking bias related crimes making headlines recently include:

> [A] white man assaults a black woman, rips off her clothes, douses her with lighter fluid and, yelling 'nigger', threatens to set her on fire.
>
> According to police in a Washington suburb, the attack capped a night in which two young white men planned to hunt down blacks in revenge for being called 'honkies', a derogatory term blacks use for whites.
>
> They pounced on two black women walking towards a shopping centre early in the morning. One escaped and ran for help, the other was

beaten, stripped nearly naked, and sprayed with lighter fluid. Bernd Debusmann, *Hate Crime Shocks Washington, Shows Race Problems*, Reuters, March 4, 1992.

In Kentucky this September, assailants beat a young gay man with a tire iron, locked him into a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage. Neal R. Peirce, *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

Amber Jefferson, a 15 year-old high school cheerleader in Orange County, Calif., almost lost her life because of the fact that she has one white and one black parent. Four attackers, allegedly all white, beat her with a baseball bat and split her face open with a shard of plate glass. Surgery to fix the wounds took 10 hours. It will be two years before she regains muscle control in her face. *Id.*

The 120 boys at Valley Torah High typically spend half their school day in college prep classes and half in religious instruction.

But for the past week--since their school was painted with swastikas, Ku Klux Klan symbols and Jewish slurs--they have been getting an education in hate. Sally Ann Stewart, *Hate Crimes: 'Litany of shame'* Incidents on rise in California, USA Today, March 13, 1992, at 3A.

Wisconsin has also not been immune from reprehensible incidents of bias related crime:

Anti-Semitic attacks erupt regularly, even at such supposedly progressive, enlightened

institutions as the University of Wisconsin (Madison), where a Jewish student center has been pelted with rocks and bottles and where Jewish fraternities and sororities have been vandalized. Counselors at a Madison Jewish day camp discovered that the brake linings had been cut on a bus used to transport children--fortunately before the bus was used. A Madison synagogue, after repeated anti-Semitic incidents, was kept under armed guard for a time. *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

In 1987, the Wisconsin legislature acted to alleviate bias related crime. The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the penalty a perpetrator receives if the State of Wisconsin (State) proves that the perpetrator intentionally selected the victim because of the victim's race, religion, color, or other protected status.

I first address Mitchell's and the majority's overbreadth argument. A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called 'chilling effect.'" *Id.* An overbreadth challenge may be based on hypothetical speculation and does not require the presence of a "chilling effect" in the defendant's particular case. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). This court has also held that where possible we must interpret a statute to avoid constitutional invalidity. *Bachowski*, 139 Wis. 2d at 405.

I conclude that the First Amendment is not implicated in this case. However, in concluding that the challenged statute is constitutional I do not take lightly the First Amendment issue that Mitchell has raised. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

I reject the majority's and Mitchell's argument that sec. 939.645, Stats., punishes or has a chilling effect on free speech. The penalty enhancement statute is directed at the action or conduct of selecting a victim and committing a crime against that victim because of his or her protected status. The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive.[2] The statute does not impede or punish

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[2]One of the majority's chief contentions seems to be that the statute is unconstitutional because it punishes motive. Although I do not think that this statute punishes motive, even if it did, I have serious doubts about the majority's conclusion that punishing motive is impermissible under the First Amendment. The majority cites no authority to support its conclusion that punishing motive is impermissible under the First Amendment. In fact, the majority fails to explain why, under its analysis, it is impermissible for the penalty enhancer statute to punish a discriminatory motive, yet permissible for antidiscrimination statutes to punish a discriminatory motive. *See, e.g., Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 424-425 (1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987) ("it is merely concluded that the company's pre-discharge conduct toward plaintiff was not based on anti-female animus. Absent such animus, there can be no violation of Title VII"); *E.E.O.C. v. Maxwell Co.*, 726 F.2d 282 (1984). In fact one writer commenting on Title VII is at complete odds with the majority's analysis of motive under the criminal law. He writes:

> Title VII was passed because Congress perceived that actions resulting from bad thoughts were sufficiently

> the right of persons to have thoughts or to express themselves regarding the race, religion, or other status of a person. The statute's concern is with criminal conduct plus purposeful selection. By enhancing the penalty, the penalty enhancer statute punishes more severely criminals who act with what the legislature has determined is a more depraved, antisocial intent: an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status. The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.
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> Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by

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> pervasive to substantially limit economic opportunities of blacks. 'Bad thoughts' is, of course, shorthand for a wide range of interior activities which are the necessary predicate for disparate treatment liability. A more common terminology is 'prohibited considerations,' but 'bad thoughts' describes more graphically what disparate treatment entails.
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> . . ..
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> The notion of bad thoughts is not peculiar to disparate treatment discrimination under Title VII. It has played an important role in the Court's constitutional decisions over the last two decades in contexts ranging from equal protection to freedom of speech and religion. Nor is such concern new in the law. Modern criminal law has always manifested a concern for motivations under the rubric of mens rea. In the discrimination context, however, motivations are both more important and more elusive than in criminal law because the 'conduct' violating Title VII is neutral or positive except when it springs from bad thoughts. In the criminal context, much prohibited conduct is itself suspect. Charles A. Sullivan, Accounting for *Price Waterhouse*: Proving Disparate Treatment Under Title VII, Brooklyn L. Rev. 1107, 1139-1140 (1991).

a defendant.[3] However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection. Permitting the use of such evidence does not chill free speech. Just as words of defendants are frequently used to prove the element of intent in many crimes without violating the First Amendment, words may be used to prove the act of intentional selection. It is no more a chilling of free speech to allow words to prove the act of intentional selection in this "intentional selection" statute than it is to allow a defendant's words that he "hated John Smith and wished he were dead" to prove a defendant intentionally murdered John Smith.

The use of speech under the penalty enhancer is not different than its use in prosecutions under antidiscrimination laws or fair housing discrimination laws. Antidiscrimination statutes often employ terms

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[3]The majority essentially contends that the use of speech as circumstantial evidence impermissibly chills free speech. Once again the majority fails to explain why this is not also true in antidiscrimination cases. For example, under Title VII sexual harassment jurisprudence, an employee's or employer's sexist speech is not merely evidence of prohibited conduct; it is the prohibited conduct. *See, e.g., Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782-83 (E.D. Wis. 1984) (in three-year period, 75 sexually explicit drawings posted on pillars and other conspicuous places in the workplace); *Volk v. Coler*, 845 F.2d 1422, 1426-27 (7th Cir. 1988) (plaintiff alleged, among other things, that her supervisor called her and other female employees 'hon,' 'honey,' 'babe' and 'tiger.') *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may be sufficient to show a hostile work environment). *See also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

similar to those contained in the penalty enhancer. For instance, secs. 118.13, 111.321, 101.225, and 66.395, Stats., all prohibit certain conduct that occurs either "because of" or "on account of" or "on the basis of" a status of another person. Proof of violations of these statutes will often involve proof of words used by the violators. Under these statutes and the penalty enhancer, a particular action or conduct is being punished, and speech may be used to prove the conduct. Under the penalty enhancer statute, speech is simply probative of the element of intentional selection. The use of such evidence does not violate the First Amendment. The action of intentional selection is punished, and the words used by a defendant are merely evidence of an intentional selection.

Although the majority attempts to distinguish this statute and antidiscrimination statutes, its distinction is a distinction without a difference. The majority at 164 states that the penalty enhancer statute is unconstitutional because the statute does not punish only the conduct of intentional selection of a victim "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim . . .." On pages 176-177, the majority abandons this reasoning when applied to antidiscrimination laws. The majority posits that the distinction between the penalty enhancer statute and antidiscrimination laws is that antidiscrimination laws punish only the discrimination, i.e., the refusal to hire, not the discriminatory motive. The majority forgets a key requirement of antidiscrimination statutes. Antidiscrimination statutes do not prohibit a person from not hiring someone of a protected class, they prohibit a person from not hiring someone of a protected class *because* or *on the basis of* his or her protected class. It is not, as the majority suggests, the failure to hire that is being punished, it is the failure to hire because of status. How can the majority find the

penalty enhancer statute unconstitutional because it punishes the "because of" aspect of a selection process, and at the same time conclude that antidiscrimination statutes, which do the same thing, are constitutional? The majority at the least ought to answer this question.

The majority also attempts to explain its very complicated and elaborate distinction between this statute and antidiscrimination laws based on some sort of difference between subjective motivations and objective acts. Although I do not quite understand the majority's use of the terms objective and subjective in the context of this case, I interpret the majority's argument to be that this statute is unconstitutional because it punishes the subjective motivations of the actor, while discrimination statutes involve objective acts of discrimination. This is merely the same distinction without a difference referred to above. Like antidiscrimination statutes, the penalty enhancer statute involves an "objective act"--the criminal conduct, e.g., the battery, etc. Likewise, despite the majority's contentions to the contrary, under the majority's analysis antidiscrimination statutes, because they require that the act be "because of" the protected status of the victim, implicate and punish the subjective motive of the actor. For example, in disparate treatment cases (cases in which the discrimination alleged is overt discrimination as opposed to disparate impact where the practices are fair in form, but discriminatory in operation) a person simply does not violate Title VII for refusing to hire a person of a protected status. The objective act alone does not invoke the provisions of the statute. Rather, the refusal must be "because of" the victim's protected status. Assuming that the majority is correct that this statute punishes motive, it fails to explain how the enhancer is any different from antidiscrimination laws.

If one assumes that the majority is correct that the penalty enhancer punishes motive there is only one distinction between it and antidiscrimination laws. The only distinction that exists between the penalty enhancer statute and antidiscrimination statutes is that the objective acts that are punished are different in that antidiscrimination laws punish legal conduct plus bad motive and the enhancer punishes criminal conduct plus bad motive. While it is true that this is a distinction, the majority never explains why it is a distinction that matters. Why is it permissible to punish motive when it is accompanied by legal conduct and impermissible to punish motive when it is accompanied by illegal conduct. The majority does not give an answer to this question, it merely concludes that the distinction somehow makes a difference. Saying so, again and again, does not make it so.

Lastly, even assuming that the majority is correct in saying that this statute punishes motive, it has still failed to explain why punishing motive is impermissible. A recent case from the U.S. Supreme Court would seem to indicate that the majority is in error. In *Dawson v. Delaware*, 90-6704, slip. op. at 5 (U.S. Supreme Court March 9, 1992), the United States Supreme Court held that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Although under the facts of *Dawson* the Court concluded that there was a First Amendment violation, its analysis lends considerable support to the conclusion that considering the perpetrator's motivations in determining the appropriate sentence is permissible. For example, in concluding that evidence that the defendant belonged to the Aryan Brotherhood was impermissibly submitted during the penalty phase of a capital case in violation of the First Amendment, the court stated:

Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war,' were related to the murder of a white hitchhiker. *See* 463 U.S., at 942-944 (plurality opinion). We concluded that it was most proper for the sentencing judge to 'tak[e] into account the *elements of racial hatred in this murder*.' *Id.*, at 949. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing. *Dawson v. Delaware*, 90-6704, slip. op. at 6-7 (U.S. Supreme Court March 9, 1992) (Emphasis added.)

The U.S. Supreme Court is clearly indicating that when racial hatred is relevant to the crime, i.e., the racial hatred is the perpetrator's reason for committing the crime, this information is completely relevant in sentencing. How then can the majority suggest that punishing motive is impermissible?

I repeat. Section 939.645, Stats., is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection, but rather anytime the choice of a victim from a protected class is shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

The penalty enhancer statute also does not seek to punish the motive of a perpetrator. Neither a

perpetrator's bigoted beliefs, nor his or her motivation for intentionally selecting a victim because of a protected status are punished. Again, it is the act of selecting a victim because of his or her race, color, or etc., that is proscribed. If a perpetrator seeks out a Jewish person to physically assault, his intent is not just to injure, but to injure a Jewish person. He may be motivated by a hatred of Jewish people, a calling from God to sacrifice a Jewish person, or some other irrational motive. This law does not look to motive. This law does not look at why the perpetrator sought out a Jewish person. It looks only to whether the fact that the victim was Jewish was a substantial factor in the defendant's purposeful choice of the victim.

Similarly, under the facts of the present case, even if Mitchell could show that his motive was not a hatred of whites, his conduct would still be punishable under the statute. As the State points out, Mitchell's motive could have been to impress the group of boys that accompanied him. Nevertheless, the statute would still apply. Its focus is not on bigoted or hateful motivations. Rather, it punishes the action of intentionally selecting a victim on the basis of a protected status listed in the statute. As Mitchell himself emphasized at oral arguments, the term "hate crimes" statute is a misnomer. The crimes that fall under the statute may be motivated by many emotions; the intentional selection is what is prohibited. The statute looks at intent, and statutes are used in many ways to punish crimes differently based on the perceived seriousness of the intent of the perpetrator. For example, an intent to kill is punished greater than an intent showing utter disregard for human life. Likewise, a reckless intent is punished less than an intent showing utter disregard for human life.

Section 939.645, Stats., does not attempt to prohibit or punish bigotry, antisemitism, or the like. It does

attempt to limit their effects. An individual's freedom to express his or her views in writing, speech, or otherwise is not regulated or chilled by this statute. What is prohibited is the act of intentionally selecting victims because of their protected status. Why a Black or a Jewish person or any other person of a protected class was chosen as the victim is not relevant. What is relevant is that the victim is intentionally chosen because of the victim's protected status.

I conclude that sec. 939.645, Stats., legitimately regulates criminal conduct, and raises no issue under the First Amendment. It does not punish speech, thought, or even motivation, nor does it sweep within its ambit actions which are constitutionally protected as to render it unconstitutionally overbroad.

II.

It is necessary to discuss the vagueness and equal protection issues, even though they are not reached by the majority. These issues are raised by Mitchell. I therefore take this opportunity to address each issue.

Mitchell asserts that this legislative attempt to alleviate bias related crime is unconstitutionally vague. Specifically he contends that the phrases "intentionally selects," "because of," and "race," are vague, undefined, and ambiguous. Thus, he argues that, they lead to erratic convictions and unfair prosecutions. I disagree.

A statute is "unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions." *Milwaukee v. Wilson*, 96 Wis. 2d at 16 (footnote omitted). This court has repeatedly indicated that "[t]he principles underlying the void for vagueness doctrine . . . stem from concepts of procedural due

process." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983).

To determine whether a statute survives a vagueness challenge, this court has applied a two-part analysis. First, the statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law adequate notice of the proscribed conduct. Second, the statute must provide adequate standards for those who enforce the laws and adjudicate guilt. *See State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989) (citing *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989)). "However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986). Furthermore, to survive a vagueness challenge it is not necessary, "for a law to attain the precision of mathematics or science . . .." *Milwaukee v. Wilson*, 96 Wis. 2d at 16. This court has summarized its analysis under a vagueness challenge as follows:

> Thus it is not sufficient to void a criminal statute or regulation to show merely that the boundaries of the area of proscribed conduct are somewhat hazy, that what is clearly lawful shades into what is clearly unlawful by degree, or that there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease. Before a statute or rule may be invalidated for vagueness, there must appear some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule. *State*

v. Courtney, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

Mitchell's first contention is that the failure of the statute to define the phrase "intentionally selects" renders the statute unconstitutionally vague because it is not a term easily understood by ordinary persons who wish to abide by the law, and fails to provide adequate standards for enforcers of its provisions. I disagree. I conclude that the phrase "intentionally selects" is sufficiently definite to provide notice of prohibited conduct to persons of ordinary intelligence who wish to abide by the law and adequate standards for those who enforce the laws and adjudicate guilt.

The word "intentionally" is a word that is easily understood. "Intentionally" means a purpose to do the thing or cause the result specified. Lay persons of ordinary intelligence do not need to scurry to their dictionaries in order to understand the meaning of this well recognized and easily understood word.

Nor is this a word that is a stranger to law enforcement officials, judges, and juries. "Intentionally" is defined in the criminal code at sec. 939.23(3), Stats.:

> 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'.

The Wisconsin statutes, particularly criminal statutes, are replete with references to "intentional" acts, or acts or conduct done "intentionally." *See, e.g.*, sec. 939.051(b), Stats. (whoever intentionally aids and

abets the commission of a crime may be charged as a principal); sec. 939.48 (person is privileged to threaten or intentionally use force against another for the purpose of self defense); sec. 940.07 ("[w]hoever knowing the vicious propensities of any animal intentionally allows it to go at large . . .."); *see also* secs. 7.37(5), 19.58, 12.13, 26.05(3)(b), 26.14(8) and 20.927(4)). Unquestionably, law enforcement officials, judges, and juries are quite capable of applying the word to varied situations in the resolution of a legal case.

Likewise, the word "selects" is well understood and easily defined. "Select" means "to choose from a number or group . . . by fitness, excellence, or other distinguishing feature. . .." Webster's Third New International Dictionary 2058 (1961). As the court of appeals concluded, the meaning of the phrase "intentionally selects" is easily discerned. It means to purposely choose or pick out. I conclude that the phrase "intentionally selects" is sufficiently clear to persons of ordinary intelligence to afford a practical guide for law-abiding behavior and is capable of application by those responsible for enforcing the law.

In the court of appeals, Mitchell appeared to make an alternative vagueness argument with respect to the phrase "intentionally selects." The court of appeals explained his argument as follows:

> Assuming that 'intentionally selects' means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term 'intentionally selects' is this: Any time an accused is a different race than the alleged victim, it can be viewed as a 'hate crime' suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because

> of race or because of other reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was 'intentionally selected.' Therefore, Mitchell argues that so long as the accused 'knows' the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines. *State v. Mitchell*, 163 Wis. 2d 652, 661-62, 473 N.W.2d 1 (Ct. App. 1991).

Although Mitchell does not appear to have abandoned this argument, he seems to have framed it in slightly different terms. Mitchell now appears to argue that the statute is vague because it does not indicate to what extent a victim's protected status must affect the perpetrator's selection decision in order to implicate the statute. In other words, he argues that because the meaning of the phrase "because of" is vague and not ascertainable by an ordinary person, a fair application of the statute is impossible, and it will likely be applied any time an accused is a different race than the victim. I do not agree.

I agree with the court of appeals that the operative terms in the statute are not whether the victim is of a different "color" or "race," or other protected status. Rather, the operative terms are whether the victim was "intentionally selected" or purposely picked out "because of" the victims race, color, etc. "If a victim is of a different race . . . than the perpetrator, that fact alone will not allow the penalty enhancer to be used." *Mitchell*, 163 Wis. 2d at 662. What is important is whether the perpetrator picked out the victim because of his or her race. The key is the "intentional selection because of" the victims protected status.

I reject Mitchell's contention that the language "intentionally selects because of" fails to define with sufficient specificity the conduct which is proscribed. I again emphasize that "'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ..'" *Bachowski*, 139 Wis. 2d at 410. (citing *Roth v. United States*, 354 U.S. 476, 491 (1957)). Giving the phrase "because of" its ordinary commonsense meaning, *see State v. Whittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, measured by common understandings and practices, I conclude that where a victim's protected status is a substantial factor in the perpetrator's selection decision, the enhancement statute applies.

It is unreasonable to construe "because of" to mean that the statute applies where race, color, or the like is only a minor or de minimis factor in the perpetrator's selection decision. Such a construction in light of the legislature's rationale (see Section III below) would be absurd. Nor would it be reasonable to construe the phrase to mean that the statute applies only when race, color, or the like is the sole factor in the perpetrator's selection decision. Legislatures realize that seldom, if ever, do people act based on one factor or consideration. Rather, people's conduct is largely driven by a multitude of factors which have varying impacts on their decisions. A reasonable reading of the statute is that it creates liability where "but for" the victim's protected status, the perpetrator would not have selected the victim for the crime. Thus, I conclude the victim's status must be a substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim.

I therefore conclude that the legislature's use of the words "because of," in sec. 939.645, Stats., although

perhaps not as precisely drafted as possible, conveys "sufficiently definite warning as to the proscribed conduct" to withstand a vagueness challenge. Furthermore, Mitchell's conduct plainly falls within the prohibited zone of the statute, as there is no doubt that Gregory Reddick's race was a substantial factor in Mitchell's selection of him as his victim.[4]

Mitchell also contends that the word "race" is vague and ambiguous. I agree with the State that it is difficult to determine the basis of defendant's argument in this regard. I construe Mitchell's argument, as did the court of appeals, to be that persons of ordinary intelligence do not know the difference between the terms "race" and "color." This argument has no merit.

I find it difficult to believe that persons of ordinary intelligence would not understand what the word "race" means. Furthermore, even if there were difficulty understanding the literal difference in the terms "race" and "color," both are terms covered in the statute. Selection because of race or color is prohibited by the statute. Therefore, if people of ordinary intelligence

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[4]The defendant has waived any challenge he might have had to the propriety of the jury instruction given in this case. However, even if it were not waived, the defendant would be hard pressed to show that the instruction given in this case caused him harm. The instruction in this case indicated that in order for the jury to conclude that the defendant intentionally selected the victim because of his race they must conclude "that the defendant knew that Gregory Reddick was a member of the white race and committed the crime of aggravated battery against him for the reason that he was a member of that race." While this instruction may have given the jury the impression that the victim's race had to be the sole factor in the defendant's selection decision, it certainly did not give the impression that a finding that race was anything less than a substantial factor would trigger the penalty enhancer statute.

understand the general parameters of either term, they have fair notice of the conduct that is prohibited.

Mitchell also suggests that the statute is unconstitutional because law enforcement authorities, judges, and juries may or may not pursue penalty enhancement under the statute based on their own prejudices or views toward the race, or religion, etc., of the victim or the defendant. I understand Mitchell's argument to be a constitutional challenge based on vagueness, i.e., because the statute is vague, law enforcement officials will use their own prejudices to apply the statute. This argument is meritless.

As I concluded above, the statute is sufficiently clear to persons of ordinary intelligence to provide adequate standards for those who enforce the laws, such that they will not be relegated to creating their own standards. The law enforcement responsibility to determine whether the conduct proscribed by the penalty enhancement statute can be proven in a particular case is no more difficult than similar determinations routinely made by officials in enforcing the law. Furthermore, the potential for improper jury bias and prosecutorial abuses is present in many cases. Safeguards exist to protect against these abuses. For example, this court has reviewed prosecutorial charging decisions to determine if there has been an abuse of discretion or discriminatory prosecution. *See State v. Karpinski*, 92 Wis. 2d 599, 609, 285 N.W.2d 729 (1979). This court has held that a prosecutor's decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Sears v. State*, 94 Wis. 2d 128, 134, 287 N.W.2d 785 (1980). Thus, discriminatory abuses can be dealt with through other law; its potential does not render a statute vague.

The last contention made by Mitchell concerning vagueness is that the statute does not provide standards to help law enforcement determine what evidence can be used to prove a violation of the statute. A statute does not have to dictate rules in regard to admissibility of evidence. Just as in any other case, the Wisconsin Rules of Evidence provide a comprehensive guide for law enforcement. Hypothetical speculation as to how far back into a person's life a prosecutor can delve to prove the prohibited conduct of intentional selection does not render the statute unconstitutional. The rules of evidence which deal with relevancy provide adequate standards to guide law enforcement in determining the appropriate nexus between evidence and alleged misconduct, such that the evidence is admissible. *See* Wisconsin Rules of Evidence 904.01, 904.02, and 904.03.

I conclude that the legislature has defined the conduct proscribed by sec. 939.645, Stats., with sufficient specificity to meet constitutional requirements with respect to vagueness. The law is clear in its terms and its meaning. When the victim's protected status (i.e., race, religion, etc.) is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative.

III.

Lastly, I discuss Mitchell's equal protection challenge. In *McManus*, 152 Wis. 2d at 130–31, this court summarized the law with respect to equal protection:

> Equal protection . . . requires that there exist a reasonable and practical grounds [sic] for the classifications drawn by the legislature. . . . Equal protection does not deny a state the power to treat persons within its jurisdiction differently; rather, the state retains broad discretion to create

> classifications so long as the classifications have a reasonable basis. The fact a statutory classification results in some inequity, however, does not provide sufficient grounds for invalidating a legislative enactment. (Citations omitted).[5]

If the statute in question does not impinge on a fundamental right or create a classification based on a suspect criterion, the legislative enactment "'must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest.'" *Id.* (citation omitted). "If the classification is reasonable and practical in relation to the objective, that is sufficient and doubts must be resolved in favor of the reasonableness of the classification." *State v. Jackman*, 60 Wis. 2d 700, 705–06, 211 N.W.2d 480 (1973). I examine sec. 939.645, Stats., under a rational basis test. The present case does not impinge on a

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[5]The Equal Protection Clause of the United States Constitution provides:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, United States Constitution.

The Equal Protection Clause of the Wisconsin Constitution Provides:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness . . . . Article I, Section 1, Wisconsin Constitution.

This court has held that the equal protection clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution. *See State ex rel. Cresci v. H&SS Department*, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974).

fundamental right or create a classification based on a suspect criterion.

Section 939.645, Stats., is violated when the victim's protected status is a substantial factor in the defendant's purposeful choice of a victim for certain crimes. When such intentional selection on account of status is proved, penalties in addition to the underlying crime are assessed. I perceive this legislation to be a legislative judgment that crimes involving intentional selection of a victim because of the victim's status cause greater harm to victims and to the public than do crimes in which status is not a factor. Because of this, the legislature has chosen to punish these intentional selection crimes more severely than conviction of the underlying crime would otherwise require.

Regulation of harmful conduct is a legitimate exercise of a state's power. The function of the legislature in drafting criminal laws is always to make reasoned decisions concerning the social harm of particular conduct. The criminal laws are replete with similar legislative judgments involving enhanced penalties. For example, sec. 939.63, Stats., increases the penalty for a crime if the person possesses, uses, or threatens to use a dangerous weapon. Similarly, if a person commits a crime while his or her identity is concealed, the penalty for the underlying crime may be increased under sec. 939.641. *See also*, sec. 939.62 (increased penalty for habitual criminality); sec. 939.621 (increased penalty for certain domestic abuse offenses); sec. 939.64 (increased penalty for committing a felony while wearing a bullet-proof garment); sec. 948.02 (sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of Class B felony, while sexual contact or intercourse with a person who has not attained the age of 16 is a Class C felony); sec. 940.31 (kidnapping, a Class B felony under the statute is enhanced to a Class A felony when it is committed with

the intent "to cause another to transfer property in order to obtain the release of the victim").

There is ample evidence to support the legislature's conclusion that intentional selection of a victim from a protected class causes a greater harm to its victims as well as to society than do crimes where the victim's status is not a factor. Many commentators have discussed the widespread psychological harms caused by crimes that appear to be bias related. *See generally*, Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Developments in the Law Sexual Orientation and the Law, 102 Harvard L. Rev. 1508, 1541 (1989). These theorists posit that bias related crimes cause injury and damage far beyond that created by similar criminal conduct which does not appear to be bias related because of their tendency to perpetuate prejudice and victimize classes of people. *See generally*, Gellman, supra at 340. Crimes that appear to be based on intentional selection because of the victim's status create fear not only among those who share the victim's race, color, religion, etc; but they also threaten society in general. Reports of intentional selection, even if perhaps not motivated by bigotry, create the appearance of bigotry and hatred. These crimes breed fear, misunderstanding, misconceptions, and isolation between different classes of people. The Wisconsin legislature has attempted to hinder these crimes, not by regulating speech, thought, or even motivation, but rather by enhancing the criminal penalty for any crime, however motivated, where the perpetrator purposefully selects a victim because of a protected status. I conclude that the legislature's action was eminently reasonable and does not violate principles of equal protection.

Mitchell posits an additional equal protection challenge to sec. 939.645, Stats. Mitchell argues that because sec. 939.645 applies only to crimes listed in the Criminal Code, chs. 939-948, and not to other crimes found in the Wisconsin statutes, it violates equal protection. Mitchell contends that this differentiation creates a classification based on suspect criterion which violates equal protection for three reasons: (1) the statute discriminates against the poor and uneducated because they are most frequently accused of the crimes listed in chs. 939-948, and in contrast "white collar" criminals are exempt from the penalty enhancement because they commit the crimes found outside these chapters; (2) treating crimes proscribed under chs. 939-948 differently from other crimes is unreasonable because some crimes found outside chs. 939-948 are more serious than those found in chs. 939-948; (3) it is unreasonable to exclude certain crimes, such as illegal restraints of trade, hunting violations, motor vehicle violations, consumer fraud, drugs and narcotics, etc., found outside chs. 939-948 from the penalty enhancement provision. Mitchell's arguments are without merit.

Section 939.645, Stats., singles out no particular group for different treatment, and thus no suspect classification is involved. As the State points out, there simply is no "white collar/poor people" distinction found in sec. 939.645. Mitchell has offered no evidence to support his theory that poor or minorities are the groups usually accused of committing crimes under chs. 939-948. Furthermore, several crimes listed in the Criminal Code involve what are traditionally viewed as "white collar" crimes. *See, e.g.*, sec. 943.70, (theft of trade secrets); sec. 943.38 (forgery); sec. 943.70 (computer crimes); and sec. 946.12 (misconduct in public office). Likewise, crimes that are not traditionally viewed as "white collar" crimes are found outside chs. 939-948. *See, e.g.*, ch. 161 which covers drug offenses.

The dichotomy which Mitchell seeks to establish does not exist and his argument is without merit.

Mitchell's second argument is also without merit. Mitchell contends that the classification is not proper because some crimes found outside chs. 939-948, Stats., are more serious than crimes in the Criminal Code. Even if, as Mitchell suggests, some crimes outside chs. 939-948 pose more serious harms, equal protection does not require legislatures to order "evils hierarchically according to their magnitude and to legislate against the greater before the lesser." *U.S. v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987), *cert denied*, 481 U.S. 1057 (1987).

Lastly, Mitchell claims it is irrational to exclude certain crimes from the penalty enhancer statute. Mitchell points to crimes such as hunting violations and motor vehicle violations and argues that these crimes may be committed against specially selected victims just as those covered by the enhancer. However, as the State notes, this assertion is also meritless because although the harm is undeniable when victims are singled out for non-criminal code crimes, the legislature is not required to legislate against all harms. *See McDonald v. Board of Election*, 394 U.S. 802, 809 (1969). Therefore no equal protection violation exists.

The State offers two further explanations for why the legislature chose to apply sec. 939.645, Stats., only to crimes grouped in the criminal code chs. 939-948. First, the crimes which are most likely to involve bias related victim selection are listed in the Criminal Code. For example, battery, homicide, and criminal damage to property are listed in the Criminal Code. Second, by limiting application of the penalty enhancer to the Criminal Code, the legislature was able to quickly identify with certainty the majority of offenses which are most appropriate for penalty enhancement. The limiting

application "avoided the cumbersome task of examining the multitude of crimes found outside the criminal code for possible unanticipated and undesired results." I find these explanations rational and practical in light of the purpose behind sec. 939.645 of preventing and deterring bias related crime.

IV.

In conclusion, no one disagrees with the majority's statement that "punishment of one's thought, however repugnant the thought, is unconstitutional." The majority misses the point entirely. Of course the Constitution protects bigoted and hateful thoughts, but it does not lend its protection to the person who harbors such thoughts and then *acts* on them. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination in the distribution of publicly available goods, [and] services . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, . . . are entitled to no constitutional protection"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("'[i]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protections.' . . . There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("'the constitution places no value on discrimination', . . . and while '[i]nvidious private discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'"). Is it the majority's conclusion that it is permissible to act on bigoted beliefs?

I conclude that the penalty enhancer statute is neither vague nor overbroad. I further conclude that the statute does not violate principles of equal protection. Accordingly, I dissent.

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of Wisconsin

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for criminal conduct if a fact-finder determines that the offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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Bray v. Alexandria Women's Health Clinic,
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Broadrick v. Oklahoma,
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Brown v. Freedman Baking Co., Inc.,
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California v. Brown,
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Chomicki v. Wittekind,
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Coker v. Georgia,
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Commonwealth v. Abu-Jamal,
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Cox v. Louisiana,
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Dawson v. Delaware,
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Dreyer v. Illinois,
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FCC v. Pacifica Foundation,
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Furman v. Georgia,
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Giboney v. Empire Storage & Ice Co.,
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Jurek v. Texas,
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Ocanas v. State,
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Roberts v. United States,
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Rogers v. EEOC,
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Rogers v. Loether,
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State v. Harris,
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State v. Mitchell,
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State v. Plowman,
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State v. Smith,
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State v. Tew,
195 N.W.2d 615 (Wis. 1972) 25

State v. Teynor,
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Stephens v. South Atlantic Canners, Inc.,
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Texas v. Johnson,
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United States v. Abel,
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United States v. Ebens,
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United States v. Franklin,
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United States v. Grayson,
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United States v. McInnis,
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United States v. Redwine,
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United States v. Skillman,
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Williams v. New York,
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42 U.S.C. § 1981 32

42 U.S.C. § 1983 32

42 U.S.C. § 1985(3) 30

42 U.S.C. § 2000e-2(a)(1) 30

42 U.S.C. § 3604 30

42 U.S.C. § 3613(c)(1) 31

42 U.S.C. § 3614(d)(1)(C) 32

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Fed. R. Evid. 402 43

Fed. R. Evid. 403 43

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Wis. Stat. § 101.22(6)(h)3. 32

Wis. Stat. § 101.22(6m)(a) 31

Wis. Stat. § 101.22(10)(d) 32

Wis. Stat. § 904.02 (1989–90) 43

Wis. Stat. § 904.03 (1989–90) 43

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Wis. Stat. § 939.645(1)(a) (1989–90) 29

Wis. Stat. § 939.645(1)(b) (1989–90) 6, 29

Wis. Stat. § 939.645(3) (1989–90) 6, 29

Wis. Stat. § 940.20(2) (1989–90) 29

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OTHER AUTHORITIES

135 Cong. Rec. H3179 (1989) 23

Eric Grannis, Note, *Fighting Words and Fighting Freestyle: the Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. (1993) 21

Gregory M. Herek & Kevin T. Berrill, *Hate Crimes* (1992) 26

Wayne R. LaFave & Austin W. Scott, *Criminal Law* § 3.6 (2d ed. 1986) 34

Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983–1987)* (November 1989) 26

Jeffrie Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 Crim. Just. Ethics No. 2 (Summer/Fall 1992) 34

Restatement (Second) of Torts § 908(1) (1979) ... 31

Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992 24

James Weinstein, *First Amendment Challenges to Hate Crimes Legislation: Where's the Speech?* 11 Crim. Just. Ethics No. 2 (Summer/Fall 1992) 33

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Joan C. Weiss, et al., *Ethnoviolence at Work* 18 J. of Intergroup Relations (No. 4, Winter, 1991-92) 27

Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 Ohio St. L.J. (1992) 43

Wis. JI-Civil 1707 (1992) 32

No. 92-515

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of Wisconsin

BRIEF OF PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Wisconsin Supreme Court are set forth in the Joint Appendix (J.A. 26-81) and reported at *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992). The decision of the Wisconsin Court of Appeals is set forth in the Joint Appendix (J.A. 15-25) and reported at *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991).

JURISDICTION OF THIS COURT

The Wisconsin Supreme Court rendered its judgment on June 23, 1992. The petition for certiorari was filed September 21, 1992. This Court granted the petition on December 14, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin penalty enhancement statute:

> **939.645 Penalty; crimes committed against certain people or property.** (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> **(2)**(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wis. Stat. § 939.645 (1989-90).

STATEMENT OF THE CASE

Statement of Facts Supporting the Conviction

The pertinent facts were summarized by the Wisconsin Supreme Court:

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You

> all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.
>
> The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

(J.A. 28-29.)

Description of the Penalty Enhancement Statute and Summary of the Proceedings Below

Mitchell was charged with and convicted of felony aggravated battery as a party to a crime. The State also alleged and proved that Mitchell was liable for sentence enhancement under Wis. Stat. § 939.645 (1989-90), the penalty enhancement statute at issue here.

In addition, Mitchell was charged with and convicted of theft as a party to a crime, based on the theft of the tennis shoes. The State charged that Mitchell was liable under the penalty enhancer for that crime, but the jury determined that the State did not meet its burden under the penalty enhancement statute (J.A. 13-14).

The enhancement statute at issue is entitled: "**Penalty; crimes committed against certain people or property.**" It authorizes increased penalties for all crimes in the Wisconsin Criminal Code if the perpetrator "[i]ntentionally selects" the crime victim or targeted property "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that

person or the owner or occupant of that property." Wis. Stat. § 939.645(1)(b) (1989–90).

When applying this law, a trier of fact must first find that a defendant committed each element of a substantive crime in the Wisconsin Criminal Code. The fact–finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection" of the crime victim under the penalty enhancement law. Wis. Stat. § 939.645(3) (1989–90) (J.A. 13). The enhancer imposes no mandatory minimum fines or periods of incarceration. The law gives sentencing judges discretion to impose higher penalties for misdemeanors and felonies. For all felonies (from aggravated battery to first degree murder) the enhancer authorizes up to an additional five years in prison.

The jury found Mitchell guilty of felony aggravated battery. The jury separately found, beyond a reasonable doubt, that Mitchell had intentionally selected his battery victim because of the victim's race (J.A. 13, 29). Mitchell's prison exposure for aggravated battery alone was two years. Using the enhancer, the judge imposed a four–year prison sentence.

Mitchell appealed to the Wisconsin Court of Appeals. He claimed the penalty enhancer was unconstitutionally vague and overbroad and that it violated his equal protection rights. The court of appeals rejected his vagueness and overbreadth challenges and found the equal protection claim waived on state procedural grounds (J.A. 17, 18–22).

Mitchell appealed to the Wisconsin Supreme Court. Five of the court's seven justices held that the penalty enhancer punished thought in violation of the First Amendment and was overbroad because it chilled free

speech (J.A. 33, 43). The majority opinion did not address Mitchell's vagueness or equal protection claims. Two justices filed separate dissenting opinions.

SUMMARY OF ARGUMENT

The Wisconsin penalty enhancer does not violate the First Amendment because it does not authorize the punishment of any protected activity and it does not chill speech. Rather, the law authorizes enhanced penalties for criminal conduct that is more serious because it is also an act of discrimination. The law authorizes an increased penalty when a fact–finder (1) determines that a crime has been committed and (2) separately determines that the offender selected his or her victim "because of" the victim's status, such as race.

The operative language of the enhancer (taking an action "because of" the victim's status) is the defining characteristic of all illegal discrimination. Governments may treat two otherwise identical actors differently if the conduct of one actor was motivated by a desire to discriminate against the race, color, ethnicity or other status of the victim. This is true whether the underlying act is legal or illegal.

A statute that defines and sanctions discrimination is not facially invalid under the First Amendment merely because discriminatory acts reflect on violators' beliefs. Wisconsin has no quarrel with, and indeed embraces, the propositions that it "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), and that it "must remain neutral in the marketplace of ideas," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978). Still, the State has interests in prohibiting and punishing discriminatory conduct that

are unrelated to the suppression of speech or the punishment of beliefs.

The Wisconsin Supreme Court relied on two distinct grounds for finding the Wisconsin penalty enhancer facially invalid under the First Amendment: first, that the enhancer effectively punishes thought; and second, that the enhancer has an impermissible chilling effect on speech because speech evidence will often be used against an offender to prove discriminatory selection. The court is wrong on both counts.

The enhancer does not authorize the punishment of thought

The Wisconsin penalty enhancer identifies a subset of crimes which have a dual nature: they are crimes and they are acts of discrimination. Significantly, this subset is made up of criminal conduct that occurs because of the discriminatory motive of the actor. The white teenager brutally beaten in this case would not have been a crime victim if Todd Mitchell had not been motivated to "'move on some white people'" (J.A. 29).

There is nothing novel about looking to the motive of a criminal offender when determining crime severity and the appropriate criminal disposition. Just last term, this Court addressed the topic in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). This Court explained that at sentencing there is no "*per se* barrier" to evidence concerning beliefs merely because the beliefs themselves are protected by the First Amendment. *Id.* at 1097. This Court suggested that evidence of racial hatred might be admissible at a capital sentencing if "elements of racial hatred" were involved in the killing. *Id.* at 1098. And earlier, in *Barclay v. Florida*, 463 U.S. 939, 949 (1983), this Court approved consideration of the

defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949. The lesson of *Dawson* and *Barclay* must be that governments may be concerned with an offender's motives and beliefs to the extent they are relevant to a proper issue in a criminal case. Thus, the fact that the Wisconsin penalty enhancer focuses attention on discriminatory criminal motivation does not make it defective.

The Wisconsin legislature has determined that discrimination crimes are likely to involve aggravating circumstances warranting higher penalties. This is precisely the same type of determination a legislature makes when it enacts any other type of penalty enhancer. That is, it determines whether a variable is reasonably associated with an increase in crime severity or offender dangerousness. In this case, the State legislature has legitimate reasons for believing that many discrimination crimes deserve higher penalties. The law does not violate the First Amendment because these reasons have nothing to do with punishing beliefs.

For example, there is no serious dispute that discrimination crimes are on the rise. The *Mitchell* majority itself acknowledged the trend (J.A. 31-32). If a particular type of crime begins to occur more frequently, that fact alone warrants increased penalties to achieve a greater deterrent effect.

Also, discrimination crimes are more likely than other offenses to provoke further crime in the form of retaliatory or copycat crimes. Discrimination crimes invite imitation and retaliation because they are directed not only toward the victim, but at every person who shares the victim's status. These and other factors supporting the enhancer are discussed in the argument section below.

The Wisconsin Supreme Court erred in its First Amendment analysis by failing to canvas all the proper governmental interests which the law advances. The State court almost completely ignored proper interests and singled out what it perceived to be an improper interest, the punishment of motive which it equated with the punishment of pure thought. Notably, the court did not hold, as it might have, that an improper *application* of the statute is the punishment of pure thought. Rather, the court took the extreme step of finding the statute facially invalid. Finally, the court failed to see that the role of motive in the enhancer is precisely the same role motive plays in all anti-discrimination laws.

This Court's recent decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), does not govern here. There is a fundamental difference between the St. Paul ordinance, that on its face proscribed *expression* based on the content of the expression and the Wisconsin penalty enhancer that does not on its face, or in effect, proscribe expression, beliefs or thought.

The enhancer does not chill expression

The second reason the Wisconsin court gave for finding the enhancer facially invalid was that it is overbroad. The court found that the law has an indirect chilling effect on activities protected by the First Amendment because people fear that evidence of these activities can be used against them in a prosecution under the enhancer.

A threshold question is whether overbreadth analysis should be applied to the alleged chilling effect of the penalty enhancer. The answer should be no. Thousands of civil and criminal laws make it likely that speech

evidence will be introduced against defendants because the laws directly or indirectly make the motive of defendants a significant issue in litigation. These laws need not be subject to law-by-law scrutiny because the connection between the laws and the asserted chilling effect is too attenuated.

However, if this Court proceeds to consider whether the Wisconsin penalty enhancer has a significant chilling effect on speech, it should answer no to that question. There are two asserted chilling effects: first, a general chilling effect on the entire populous, and second, a chilling effect on criminals while they commit crimes.

As to the first alleged chilling effect, it is unreasonable to believe that citizens in general will censor themselves because they fear they might be prosecuted for a crime under circumstances in which it appears they selected their crime victim because of the victim's status. More fundamentally, throughout the history of our legal system, speech has been used against defendants under innumerable criminal and civil laws, including all anti-discrimination laws, without producing a significant chilling effect.

As to the chilling effect on criminals during the commission of their crimes, the response is that these persons can easily avoid this "chilling effect" by not committing crimes. Furthermore, persons who commit discrimination crimes frequently want their victims to know they are being singled out because of their status. Self-censorship is unlikely because it is self-defeating for these criminals.

Finally, Wisconsin shares the concern that there is the potential for the abusive use of speech evidence in particular cases under the enhancer. But this potential

exists with many laws, as exemplified by the *Dawson* case. The answer is not the drastic step of facial invalidation. Abuses are avoided when litigants and judges are mindful of the proper relevancy limits on the admissibility of evidence, are mindful of the importance of protecting First Amendment activities, and when appellate courts provide the type of guidance this Court provided in *Dawson*.

ARGUMENT

I. THE WISCONSIN PENALTY ENHANCER ADVANCES BOTH THE GOAL OF DETERRING AND PUNISHING ACTS OF DISCRIMINATION AND THE GOAL OF MAKING THE PENALTY FIT THE CRIME AND THE OFFENDER; THE ENHANCER IS NOT FACIALLY INVALID UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT TARGET, PUNISH, OR SUPPRESS BELIEFS OR EXPRESSION.

A. Introduction.

The first reason the Wisconsin Supreme Court gave for finding the penalty enhancer facially invalid under the First Amendment was that the law effectively authorizes the direct punishment of thought. The court's flawed analysis proceeds as follows: (1) the penalty enhancer is triggered by proof that the offender selected his or her crime victim "because of" the victim's race or other listed status; (2) the most frequent reason an offender targets a status for a crime is prejudice against that status; (3) because criminal laws already authorize penalties for every component of the physical conduct, the enhancer must focus solely on the prejudiced motive for selection; (4) prejudiced motive for

selection is solely a mental process; and, therefore, (5) the enhancer effectively punishes unpopular "thought," that is, prejudiced motivation.

The court's analysis is wrong in several respects, but its primary defect flows from its narrow focus on the issue of motive. Not only does the court examine motive to the exclusion of other legitimate state interests supporting the enhancer, it misanalyzes both the role motive plays in the penalty enhancer and the government's legitimate interests in the motive of a criminal offender.

The proper First Amendment analysis begins with the highly significant observation that the enhancer does not on its face authorize punishment for any constitutionally protected activity. Rather, the enhancer singles out a type of crime: criminal acts that are both crimes and acts of discrimination against the victim. The enhancer simply does not and could not permissibly authorize the punishment of pure thought. There is no doubt that "one may not be imprisoned or executed because he holds particular beliefs." *American Communications Ass'n v. Douds*, 339 U.S. 382, 408 (1950).[1]

---

[1]It might be suggested that a First Amendment issue exists because discrimination crimes are themselves expressive conduct. However, if that characterization of the criminal conduct is accurate, an unlimited array of laws is subject to some level of First Amendment scrutiny. Many criminal acts (such as sexual assault and failure to pay income taxes) and virtually all acts of illegal discrimination can be viewed as expression of some type. However, this Court has rejected such an expansive definition of expression: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaged in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Violence and "other types of potentially expressive activities that produce special harms distinct from their communicative impact"

Because the law does not on its face authorize the imposition of punishment for any constitutionally protected activity, the only possible First Amendment inquiry is whether the government has interests in imposing enhanced penalties on discrimination crime offenders that do not relate to the punishment of beliefs or expression. Such legitimate interests exist and they are discussed in detail below. Generally, they relate to the punishment and deterrence of discriminatory conduct and the imposition of punishment that fits both the crime and the offender.

It is important to remember that this statute, or any other, is not facially invalid simply because it might be used in a particular case to punish a protected activity. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946) (an otherwise valid state trespass statute may not be used to punish the distribution of religious literature in a company owned town). If the *Mitchell* court was concerned that a sentencing judge might impose an enhanced penalty under the law for the sole reason that the judge does not like the thoughts of a discrimination crime offender, the court should have stated that such an application of the statute is unconstitutional. But there was no reason to strike the law down on its face.

The *Mitchell* court not only ignored proper governmental interests supporting the law, it also failed to see that the role of motive in the enhancer is precisely the same role motive plays elsewhere in criminal law and the same role it plays in all anti-discrimination laws. In the following sections of this brief, the State will explain why the roles are the same and why the government frequently has a legitimate interest in the

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are not entitled to constitutional protection. *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

motive of an actor. The obvious starting point is a discussion of *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), because those cases make clear that motive, even a racial hate motive, may be a proper governmental concern when deciding whether to impose a more severe sanction, even the death penalty.

B. Motives for criminal conduct, even those involving racial hatred, are a proper governmental concern when they are relevant to a legitimate issue in a criminal proceeding.

1. *Dawson v. Delaware* and *Barclay v. Florida* teach that the First Amendment does not prohibit consideration of a criminal's motives during the sentencing process when those motives are relevant to the commission of the crime or to a proper sentencing factor.

In *Dawson*, a white defendant was convicted of murdering a white female. There was no racial motivation for the murder. This Court held that Dawson's First Amendment rights were violated at sentencing when the government introduced a short stipulation regarding Dawson's membership in a "racist prison gang" called the "Aryan Brotherhood." *Dawson*, 112 S. Ct. at 1098-99. Admission of the stipulation was improper because there was no demonstrated connection between Dawson's membership in a racist gang and his crime or a relevant sentencing factor. *Id.* at 1097-98. This Court explained that "Dawson's First Amendment rights were violated by the admission of the Aryan

Brotherhood evidence . . . because the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 1098.

At the same time, this Court stated that there is no "*per se* barrier to the admission of evidence concerning one's beliefs . . . at sentencing simply because those beliefs . . . are protected by the First Amendment." *Id.* at 1097. Therefore, this Court explained that the result in *Dawson* might have been different if "elements of racial hatred" were involved in the killing. *Id.* at 1098.

The *Dawson* decision affirmed, in its First Amendment context, an earlier decision that did not involve a First Amendment challenge. In *Barclay v. Florida*, the sentencing judge discussed the racial motive for the murder and compared it with his own experience in World War II. *Barclay*, 463 U.S. at 948. A plurality of this Court approved consideration of the defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949. As a concluding comment the plurality stated: "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Id.* at 950.

Dawson and *Barclay* teach that a criminal's motive is a proper consideration if it is relevant to a proper sentencing issue, even when that motive also reveals the protected thoughts of the offender and even when the motive is proved through the presentation of speech or associational evidence. For example, it is true that a racial hate motive for a crime shows that the offender holds what most people consider to be despicable beliefs and it is not permissible to punish that offender simply because he holds despicable beliefs. But at the same time a racial hate motive is an excellent indicator of

future dangerousness. It is one thing to batter someone who provokes you in some manner. It is quite different to single out and batter a person walking down the street for no other reason than contempt for the color of his skin. Apart from what the offender's motive says about his beliefs, a state need not ignore what it says about the nature of his act and his future dangerousness.

There is a further lesson that can be gleaned from *Dawson*. This Court properly treated Dawson's First Amendment claim as an "as applied" challenge. This Court did not strike down any part of the Delaware capital sentencing law just because that statutory scheme created the potential that a prosecutor might improperly introduce First Amendment activity evidence and that a jury might improperly recommend the death sentence based on its view of an offender's "abstract beliefs." *Id.* at 1098.

Similarly, there is no reason to strike down the Wisconsin statute. The Wisconsin enhancer is not facially invalid simply because a sentencing judge might consider an improper factor in the course of sentencing an offender. In fact, the chances of abuse are actually less under the enhancer than under the Delaware capital sentencing law. This is true because, unlike the Delaware law, the enhancer focuses attention on issues that are inherently connected to the nature of the offense and the offender's motivation for committing the crime.

2. The Wisconsin Supreme Court wrongly concluded that the Constitution permits a sentencing judge to consider evil motives when setting a penalty within the parameters of a penalty range for an underlying crime, but that consideration of the same motives is impermissible in the context of a penalty enhancer.

The *Mitchell* majority rejected the suggestion that *Dawson* has application to the issue here. It distinguished *Dawson* in the following sentence:

> Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

(J.A. 43 n.17.)

The apparent thrust of this distinction is that it is permissible to consider motive in the context of an underlying penalty range, but impermissible to consider it in the context of an enhancer. The distinction is illogical. If a motivation for an executed crime is "thought," fully protected by the First Amendment (as the court asserts), then there is no reason why such "thought" should enjoy less protection in the context of a sentencing conducted within the penalty range for an underlying crime than it enjoys in the penalty enhancement context. If an offender receives an extra year in prison attributable solely to his or her motive, it is no less a First Amendment violation if that occurs in

the context of the parameters of an existing penalty range or in the context of an enhanced penalty range. The constitutional evil, if there is one, is the improper punishment of protected belief.

Perhaps the Wisconsin court's concern is with the State legislature's role. But there is no federal constitutional requirement as to how the states must apportion sentencing authority between a state judiciary and a state legislature. *See Dreyer v. Illinois*, 187 U.S. 71, 83 (1902). In Wisconsin, the legislature has the power to set specific penalties, penalty ranges and to determine the scope of trial court sentencing discretion. *State v. Borrell*, 482 N.W.2d 883, 890 (Wis. 1992).

It follows that when a legislature enacts a sentencing scheme, including penalty enhancers, it may consider all the same factors sentencing judges themselves consider. The following section presents several factors, unrelated to the punishment of thought or the suppression of speech, that support discrimination crime penalty enhancers.

C. Crimes fueled by discrimination are particularly heinous and deserve higher penalties because they are likely to involve a more severe offense and a more dangerous offender.

The *Mitchell* majority seemingly views a discriminatory motive as just another fungible reason a crime occurs, with no special significance warranting penalty enhancement. But this view ignores the fact that discrimination crimes do not just happen. These perpetrators seek out their victims because of their status.

The elimination of discriminatory conduct is a "compelling state interest[] of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). At the same time, legislatures have broad power to establish penalties and to adapt penal laws to the conditions that exist. *Weems v. United States*, 217 U.S. 349, 379-80 (1910). More particularly, states have the power to enact penalty enhancers that are rationally related to the proper punishment for an offense. *Jones v. Helms*, 452 U.S. 412, 422-24 (1981).

The broad sweep of factors relating to appropriate punishment is discussed in *Williams v. New York*, 337 U.S. 241, 245, 249-51 (1949), where this Court upheld a state policy that encouraged sentencing judges "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court repeated that a sentencing determination "'should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). In Wisconsin, proper sentencing considerations include the offender's motive, personality, character and social traits. *State v. Harris*, 350 N.W.2d 633, 639 (Wis. 1984).

Several factors support a statutory scheme that gives sentencing judges greater latitude when criminal conduct is prompted by a discrimination motive.

Reprehensible nature of crime

When Todd Mitchell directed a brutal attack on Gregory Reddick simply because Reddick was white and happened to be walking down the street, Mitchell committed a doubly depraved act. It was wrong as an

act of violence, but it was additionally wrong as a violent act of discrimination.

Nothing in the Constitution requires governmental apathy toward the actual degree of depravity of Mitchell's crime just because it might reflect on his constitutionally protected thought. *Cf. R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). There is nothing new about looking into a person's mind to determine the depravity of his act. For example, we deem that a murder motivated by financial profit is more heinous than another otherwise identical murder. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

One legal commentator addressing this topic points to the case of a husband who murders his wife knowing he is the beneficiary of her insurance policy and who files a claim for the benefit. Under these circumstances the husband is still not eligible for the death penalty under the model penal code unless the state can show his primary motivation was pecuniary gain. Thus, two murderers may commit identical acts, down to filing an insurance claim, but only one may be sentenced to death solely because he was motivated by a desire for money. Eric Grannis, Note, *Fighting Words and Fighting Freestyle: the Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178, 192 (1993) (citing *State v. Madsen*, 609 P.2d 1046 (Ariz.), *cert. denied*, 449 U.S. 873 (1980)).

Murderers surely have the constitutional right to believe that life is expendable in the pursuit of money. But when such people act on their beliefs, society may look at their motive to assess the depravity of the act

and the appropriate penalty. Todd Mitchell has a right to hate people because of the color of their skin and the right to express that view in any number of ways protected by the First Amendment. But he had no right to harm Gregory Reddick because of the color of Reddick's skin.

The logical extension of the *Mitchell* decision is that a discrimination motive has greater constitutional protection than a financial motive. Under the reasoning of *Mitchell*, when a person beats someone because of the victim's skin color, the government must ignore the motive when assessing the nature of the act. But when an offender beats someone because the offender desires money, the government may consider the motive to assess the crime and the penalty.

This position is untenable in light of the states' compelling interest in rooting out discriminatory conduct. *See Roberts*, 468 U.S. at 623. The Constitution places no value on discriminatory acts, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and the only feature which differentiates discriminatory acts from other acts is the motive of the actor. There is simply no reason the Constitution forbids our elected representatives or the judiciary from making the value judgment that discriminatory acts have a particularly depraved nature.

Retribution is a proper aim of criminal law. *Furman v. Georgia*, 408 U.S. 238, 308 (1992) (Stewart, J., concurring). While retribution is no longer the dominant object of criminal law, it is neither forbidden nor inconsistent "with our respect for the dignity of men." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citations omitted). The Wisconsin penalty enhancer certainly is consistent with our respect for the dignity of all people, regardless of race, ethnicity or other status. Criminal acts take on a heinous quality simply because they are

motivated by a desire to discriminate. It follows that society has a retribution interest in punishing discrimination crime.

Deterrence

The *Mitchell* majority acknowledges the obvious, that the Wisconsin Legislature was motivated by a "desire to suppress hate crimes" (J.A. 48). Deterrence, of course, is a proper governmental goal of both criminal laws, *Harmelin v. Michigan*, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring), and civil anti-discrimination laws, *Smith v. Wade*, 461 U.S. 30, 54 (1983).

Furthermore, violations that occur with increasing frequency merit penalties with a greater deterrent effect. *State v. Smith*, 302 N.W.2d 54, 57 (Wis. Ct. App. 1981); *see also Weems v. United States*, 217 U.S. 349, 379 (1910). There is no serious dispute that discrimination crimes are occurring with greater frequency. Even the *Mitchell* majority states: "Statistical sources indicate that incidents of all types of bias related crime are on the rise" (J.A. 31). *Cf. People v. Grupe*, 532 N.Y.S.2d 815, 819-20 (1988) (court relied on state task force finding that bias-related crime was increasing).

The United States Congress has also recognized the need to address bias related crime. On April 23, 1990, it enacted the "Hate Crime Statistics Act of 1990." The act requires the collection of data on crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity. Congress was responding to "disturbing signs that the number of hate crimes has skyrocketed in this country." 135 Cong. Rec. H3179 (1989) (statement of Rep. Schumer, supporting the Hate Crimes Statistics Act).

Prompts additional crime

Discrimination crimes are more likely than other crimes to provoke further crime in the form of retaliatory crime or copycat crimes. *State v. Plowman*, 838 P.2d 558, 564 (Or. 1992), *petition for cert. filed* November 23, 1992. They invite imitation and retaliation because they are directed not only toward the victim, but toward the victim's entire group. *Id.* Incidents across the country have given grave testimony to this sad fact. For example, retaliatory crimes were prompted by a 1992 attack in New York City in which a group of white youths squirted white shoe polish on the faces of a black teen-age boy and his 12 year old sister. *See* Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992; *see also State v. Beebe*, 680 P.2d 11, 13 (Or. Ct. App. 1984) (discrimination crimes commonly "escalate from individual conflicts to mass disturbances").

Future dangerousness of offender

The future danger posed by an offender is a proper sentencing concern. *See Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). It is entirely reasonable to believe that offenders who are motivated to commit crimes because of discrimination are generally more likely than other offenders to pose a danger of repeat criminal behavior. Their motivation is not situational. Rather, the fact that they acted criminally on a discriminatory motive indicates such beliefs are deeply seated and will prompt more criminal activity in the future. It can accurately be said, for example, that many gay bashers view themselves at war with all gays and will likely continue the "fight" unless severely sanctioned.

An offender's lack of remorse is also an indicator of future dangerousness. *State v. Harris*, 350 N.W.2d 633, 639 (Wis. 1984). *See also Roberts v. United States*, 445 U.S. 552, 556-57 (1980) (failure of offender to cooperate in investigation of related criminal acts indicated a refusal to "'shape up and change his behavior'"). It is certainly reasonable to assume that offenders who commit crimes because of discrimination are less likely than most offenders to feel true remorse. After all, in most cases it was an elevated disdain for the basic rights of the targeted group which prompted the crime in the first place.

There is quite a difference between punishing someone for holding a belief and finding that an offender is dangerous because he or she has a demonstrated propensity for acting unlawfully on that belief. The State's legitimate interest is the latter.

Effects on targeted group

There is no doubt that legislatures may address the "public injury" caused by crime. *See Coker v. Georgia*, 433 U.S. 584, 597-98 (1977); *see also United States v. Grayson*, 438 U.S. 41, 46 (1978); *State v. Tew*, 195 N.W.2d 615, 619 (Wis. 1972). In particular, special attention may be given to crimes that undermine a "community's sense of security." *Coker*, 433 U.S. at 598 (insecurity of women caused by rape).

When discrimination crimes occur, members of the targeted group feel a loss of security. Importantly, this damage to the targeted group exists regardless whether the offender intended to send any message through his or her criminal act. For example, if a group of white youths in a high school single out a particular minority member for a beating, many and perhaps all students in

that minority group will feel unsafe. Several may alter their habits to avoid the perceived danger. This damaging effect occurs apart from any message the offenders intended to send.

Moreover, discrimination crimes frequently occur when a victim enters a neighborhood where the offender thinks the victim does not belong. The cumulative effect of such crimes is to make whole neighborhoods inaccessible to people based on status. *See* Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)*, at 8 (November 1989).[2] *See also* Gregory M. Herek & Kevin T. Berrill, *Hate Crimes*, at 71 (1992) (people construct mental "safety-maps").

Effects on the victim

Criminal law has long taken into account the emotional harm suffered by a victim when imposing punishment. This practice has even been upheld in death sentence cases. *Payne v. Tennessee*, 111 S. Ct. 2597, 2604 (1991) ("emotional harm" is a proper sentencing consideration in a capital case, without regard to blameworthiness of offender). This Court has recognized, for example, that rape causes "mental and psychological damage" to victims in addition to physical injury. *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977).

Similarly, Wisconsin law recognizes the propriety of considering the fear and terror suffered by a crime victim. *State v. Teynor*, 414 N.W.2d 76, 88 (Wis. Ct. App. 1987). The fact that such fear may be induced in

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[2]A copy of this unpublished document has been lodged with the clerk for the convenience of the Court.

the course of the crime by verbal threats does not insulate the offender. *See, e.g., Ocanas v. State*, 233 N.W.2d 457, 462-63 (Wis. 1975).

In the civil anti-discrimination context, this Court has recognized that psychological harm was a concern of Congress when it enacted Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). In the course of determining the coverage of Title VII, this Court rejected the claim that Congress was only concerned with tangible losses of an "'economic character,'" and not psychological harm. *Id.* at 64. This Court repeated with approval a lower court's statement: "'One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.'" *Id.* at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

There appears to have been only limited research on the topic of discrimination crime, but at least one study found that victims of violent discrimination suffer greater emotional harm. Victims of ethnic violence suffered 21% more symptoms of stress than victims of similar acts of non-ethnic violence. Joan C. Weiss, et al., *Ethnoviolence at Work*, 18 J. of Intergroup Relations, 20, 27-28 (No. 4, Winter, 1991-92). These symptoms included sleep problems, trouble concentrating, more alcohol use, a desire to hurt people who hurt you, and feelings of helplessness. *Id.* at 27.

These legitimate interests support the penalty enhancer

The above sections demonstrate that proper governmental goals, unrelated to the suppression of

speech or the punishment of thought, are advanced by the discrimination crime penalty enhancer. As dissenting Justice Abrahamson states: "when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone" (J.A. 50). She recognizes that the State "has legitimate, reasonable and neutral justifications for selective protection of certain people" and that these justifications are present "even when the conduct is linked to viewpoints otherwise protected by the First Amendment" (J.A. 50). *Accord State v. Beebe*, 680 P.2d 11, 13 (Or. Ct. App. 1984).

The Wisconsin penalty enhancer no more authorizes the punishment of pure thought than does the Delaware capital sentencing statute addressed in *Dawson*. While both laws make the motive of the offender an issue, neither authorizes the punishment of a constitutionally protected right. And in both cases, legitimate governmental interests justify the laws.

The above discussion shows the fallacy in the *Mitchell* majority's conclusion that the enhancer creates a unique context in which thought is isolated and punished. In the next section, the State addresses certain erroneous statements of the *Mitchell* majority that suggest there are other constitutionally significant differences between the enhancer and other anti-discrimination laws.

D. The Wisconsin Supreme Court failed to recognize that the Wisconsin penalty enhancer is a true anti-discrimination law and the court erroneously relied on a distinction between "motive" and "intent."

1. The operation of the Wisconsin penalty enhancer.

Under the Wisconsin penalty enhancer, higher penalties are authorized, but not required, if an action is taken against a victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. § 939.645(1)(b) (1989-90). The predicate action under the enhancer is a criminal offense. A trier of fact must first find, beyond a reasonable doubt, that a defendant committed each element of a crime. Wis. Stat. § 939.645(1)(a) (1989-90). The fact-finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection . . . because of" the status of the crime victim. Wis. Stat. § 939.645(3) (1989-90) (J.A. 11-12, 13).

It is certainly true that the penalty enhancer is an example of the Wisconsin Legislature singling out a particular subset of crime for special treatment. This is not unusual. Legislatures routinely single out types of crime for penalty enhancement.

For example, Wisconsin and other states provide greater penalties when a battery victim is a police officer. Wis. Stat. § 940.20(2) (1989-90). These laws are not facially invalid under the First Amendment simply because such batteries frequently demonstrate the offenders' contempt for law enforcement. Instead, penalty enhancement for batteries against police officers

and for discrimination crimes are facially valid under the First Amendment for a deceptively simple reason. On their faces, neither type of law requires or authorizes the punishment of any protected First Amendment activity. And in both instances, the government is concerned with what the enhancement variable says about the dangerousness of the offender and severity of the crime, not with suppressing or punishing speech or thought.

2. "Because of" selection is the key feature of both the Wisconsin enhancer and all other anti-discrimination laws.

The language that triggers penalty enhancement under the Wisconsin statute (action "because of" a particular status) is either literally or functionally the same as language that triggers liability under hundreds of civil rights and anti-discrimination laws. These laws impose liability when an actor takes some action "because of" the race, religion or other specified status of the affected person.[3]

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[3]*See, e.g.*, Title VII as amended by 42 U.S.C. § 2000e-2(a)(1) (prohibiting various employment actions "because of [the employe's] race, color, religion, sex, or national origin"); 42 U.S.C. § 3604 (prohibiting interference with housing choices "because of [the victim's] race, color," or other listed status); and Wis. Stats. §§ 111.321-.322 (prohibiting employment actions "because of" age, race, or other listed status); *see also Bray v. Alexandria Women's Health Clinic*, 61 U.S.L.W. 4080 (U.S. January 13, 1993) (the "animus" requirement of 42 U.S.C. § 1985(3), demands "at least" proof of "a purpose that focuses upon [victims] *by reason of their [status]*").

Discriminatory motive plays exactly the same role in both the enhancer and other anti-discrimination laws. In both cases, the presence of discriminatory motive *alone* affects the sanction imposed on conduct. In the penalty enhancer context, the existence of a discriminatory motive is the difference between a higher or a lower maximum penalty. Under other anti-discrimination laws, the existence of a discriminatory motive is the difference between liability and no liability at all. *E.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (under the *disparate treatment* theory, proof of a discriminatory motive is critical).

The *Mitchell* court admits, as it must, that anti-discrimination laws are "concerned" with motive. But the court claims that civil anti-discrimination laws do not carry punitive sanctions and that the motivation of the civil offender does not affect the sanction imposed (J.A. 46-48 n.21). Both assertions are wrong.

Although anti-discrimination laws are primarily remedial in nature, some do authorize punitive sanctions for the purposes of punishment and deterrence. For example, both federal and Wisconsin fair housing laws authorize punitive damages. 42 U.S.C. § 3613(c)(1); *Rogers v. Loether*, 467 F.2d 1110, 1112 (7th Cir. 1972), *aff'd*, *Curtis v. Loether*, 415 U.S. 189 (1974); Wis. Stat. § 101.22(6m)(a); *Chomicki v. Wittekind*, 381 N.W.2d 561 (Wis. Ct. App. 1985); *see also Smith v. Wade*, 461 U.S. 30, 54 (1983) (discussing the nature of punitive damages and relying on Restatement (Second) of Torts § 908(1) (1979)); *Brown v. Freedman Baking Co., Inc.*, 810 F.2d 6, 11 (1st Cir. 1987) (punitive damages are an appropriate means of punishing and deterring racially discriminatory employment practices). Punitive damages may "embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the

likelihood of its recurrence, and the extent of defendant's wrongful gain," *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991). In fact, Chief Justice Rehnquist has noted that punitive damages are "'quasi-criminal'" in nature. *Smith*, 461 U.S. at 59 (Rehnquist, J., dissenting) (quoting *Huber v. Teuber*, 10 D.C. 484, 490 (1877)). In addition, both federal and Wisconsin laws authorize the imposition of civil monetary penalties. 42 U.S.C. § 3614(d)(1)(C), and Wis. Stat. § 101.22(10)(d) and (6)(h)3.

Furthermore, the motives of civil anti-discrimination law violators do affect the available sanctions. In Wisconsin punitive damages are available in fair housing actions if a plaintiff shows a defendant acted out of "hatred," "ill will" or "a desire for revenge." *See* Wis. JI-Civil 1707 (1992), and *Chomicki v. Wittekind*, 381 N.W.2d 561, 565 (Wis. Ct. App. 1985). Likewise, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages if the defendant's conduct is shown to be motivated by malice, "evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. *See also Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988). This issue "typically demands inquiry into the actor's subjective motive and purpose." *Smith*, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

Another distinction the *Mitchell* majority relies on is its assertion that anti-discrimination laws carry only civil penalties, in contrast with the penalty enhancer, which increases a criminal penalty (J.A. 46-48 n.21). However, this "distinction" ignores federal anti-discrimination laws that carry criminal sanctions. *See, e.g.*, 18 U.S.C. § 245 (prohibiting interference with certain rights "because of [the victim's] race, color,

religion or national origin") and 42 U.S.C. § 3631 (criminalizing interference with housing choices "because of" a listed status of the victim).

Furthermore, Professor James Weinstein points out that this Court has long recognized that the issue in First Amendment cases is not the civil or criminal nature of the law in question, but whether the regulation in fact suppresses or penalizes protected activities. James Weinstein, *First Amendment Challenges to Hate Crimes Legislation: Where's the Speech?* 11 Crim. Just. Ethics No. 2, at 14-15 (Summer/Fall 1992). He relies on *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), where this Court said: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

It is not surprising that the *Mitchell* majority fails to answer the telling question of dissenting Justice Bablitch. He asks: "How can the Constitution not protect discrimination in the marketplace when the action is taken 'because of' the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken 'because of' the victim's status?" (J.A. 54). The obvious answer is that it does not.

3. The distinction between motive and intent has no constitutional significance.

The *Mitchell* majority apparently believes the enhancer is defective because it is defined in terms of "motive" and not "intent." However, the "intent/motive" distinction is a red herring (J.A. 35-39). First, it is questionable whether there is a principled distinction

between "intent" and "motive." *See* Jeffrie Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 Crim. Just. Ethics No. 2, at 20–23 (Summer/Fall 1992).

Second, it is a simple matter to characterize the enhancer requirement (selection "because of" the status of the victim) as "intent" and the reason that prompts the selection (such as racial hate) as the "motive." Writing on this topic, Professor LaFave gives the following example: "when *A* breaks into *B*'s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive." Wayne R. LaFave & Austin W. Scott, *Criminal Law* § 3.6, at 228 (2d ed. 1986). Put in these terms, Todd Mitchell's purpose of singling out Reddick because of race was his intent. A desire to show hatred of whites may or may not have been his motive. Thus, the enhancer does not define iteself in terms of "motive."[4]

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[4]What the State must prove at trial to show "because of" selection has never been in serious dispute in this case. Under any reasonable definition of "because of," there can be no doubt that Todd Mitchell selected his victim because of race. The majority in *Mitchell* never endeavored to define the term "because of." However, in the context of rebutting Todd Mitchell's vagueness claim, dissenting Justice Bablitch did provide a definition which is consistent with discrimination law generally. He said the State was required to prove that the victim's status was a "substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim" (J.A. 71). He summarized: "When the victim's protected status . . . is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative" (J.A. 74). The majority does not take issue with this description. Rather, the majority erroneously concludes that this description describes "motive." The majority states:

The third, and most important reason, the "intent/motive" distinction is a red herring is that it has no constitutional significance. There is no reason to suppose that the Constitution forbids a legislature from defining a crime in terms of motive. For example, a capital sentencing scheme that authorizes the death penalty if an offender is motivated by a desire for money does not violate the Constitution. *Jurek v. Texas*, 428 U.S. 262 (1976). Plainly, the desire for money is a motivation in the very same sense the *Mitchell* majority considers racial hate to be a motive. Therefore, even if the intentional selection of a crime victim because of the victim's status is considered to be the codification of a "motive," there is no constitutional deficiency for that reason.

Accordingly, the Wisconsin Supreme Court erred in several respects. It wrongly saw the enhancer as effectively punishing thought, it failed to consider legitimate state interests that support the enhancer, it did not recognize that the enhancer is an anti-discrimination law, and it relied on an erroneous view of "motive." In the following section, the state explains why the court's reliance on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), was misplaced.

> [The confusion over motive] is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" . . . as "a purpose to do the thing or cause the result specified," correctly recognizes . . . that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

(J.A. 37 n.11.)

E. The penalty enhancer is not facially invalid under *R.A.V. v. City of St. Paul*, because the law does not prohibit expression; rather, it enhances the available criminal penalties for criminal conduct directed at certain persons or groups.

The St. Paul ordinance reviewed in *R.A.V.* prohibited a subset of expressive "fighting words" based on the content of the expression. The St. Paul City Council singled out and prohibited only those "fighting words" that communicated certain types of group hatred. *Id.* at 2548. This approach ran afoul of the First Amendment's "'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 2545.

In *R.A.V.*, this Court's concern was that the St. Paul ordinance proscribed a particular type of *speech*, that is, "messages of racial, gender, or religious intolerance." *Id.* at 2549. Although the "fighting words" covered by the ordinance are generally "unprotected," they are speech nonetheless and governments may not favor some speech over other speech. *Id.* at 2543.

The importance of the law's direct prohibition on speech was further underscored when this Court differentiated laws that proscribe speech from laws that protect persons or groups:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition

> of fighting words that contain . . . messages of "bias-motivated" hatred.

Id. at 2548 (emphasis in original). Accordingly, a law that prohibits fighting words directed at persons because of their race or ethnicity would be facially valid if it met the requirements of the Equal Protection Clause.

The Wisconsin penalty enhancer is yet another step removed from the above hypothetical law because it does not regulate *expression* directed at certain persons; rather, it deals with *criminal conduct* directed at certain persons. It contains no requirement, express or implicit, that punishment be enhanced because of any particular message sent by the criminal conduct. Indeed in the instant case, the prosecutor never attempted to prove that Todd Mitchell sent Gregory Reddick a "message." The availability of penalty enhancement was triggered by discriminatory selection without regard to whether a message was sent or intended.

The same analysis rebuts any argument that the Wisconsin penalty enhancer is a content based prohibition on thought. The enhancer does not require proof of any mental process beyond intentional selection because of status. There is no requirement that the State prove, for example, that the offender hated members of the targeted status. As the State has often pointed out, Todd Mitchell might have been motivated by a desire to appear tough and rebellious to impress his peers. But the fact that Todd Mitchell may. not hate whites does not diminish the seriousness of his crime.

The above discussion shows there is a fundamental difference between the St. Paul ordinance and the Wisconsin penalty enhancer. The St. Paul ordinance was struck down on its face because it was directed at expression; it differentiated prohibited from non-

prohibited expression and did so based on the content of messages conveyed. The Wisconsin enhancer is directed at discriminatory criminal conduct. Its differentiation is based on whether the criminal act is targeted at an individual because of the person's status. The Wisconsin law does not single out any belief or type of message a criminal might communicate by his or her crime. It can be "'*justified* without reference to the content of" the offender's thought or expression. *R.A.V.*, 112 S. Ct. at 2546 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

II. THE WISCONSIN PENALTY ENHANCER HAS NO SIGNIFICANT CHILLING EFFECT ON SPEECH.

If this Court agrees with the State that the Wisconsin penalty enhancer does not directly punish activities protected by the First Amendment, it must nonetheless address the Wisconsin Supreme Court's independent justification for finding the enhancer facially invalid. The Wisconsin court held that the enhancer is overbroad because it has the ancillary effect of chilling free speech. The court believes protected activities, such as speech, are chilled because people know that evidence of such activities can be used against them in a criminal prosecution involving the enhancer (J.A. 33, 44–46).

To bring the *Mitchell* majority's argument into clearer focus, it is exactly the same argument that might be applied to any law which directly or indirectly makes motive, intent or knowledge an issue. In every disparate treatment employment discrimination action, the employer's motive is an issue and with high frequency that motive is demonstrated by the employer's speech. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Criminal laws themselves frequently make motive an issue. In virtually every first degree murder case the killer's intent or motive is an issue and the evidence presented on those topics is often the killer's own speech. As Justice Bablitch explained in his dissent, "It is no more a chilling of free speech to allow words to prove the act of intentional selection in this 'intentional selection' statute than it is to allow a defendant's words that he 'hated John Smith and wished he were dead' to prove a defendant intentionally murdered John Smith" (J.A. 60).

In the next section, the State suggests that overbreadth analysis ought not be applied to this asserted indirect chilling effect. In the remaining section, the State explains why there is no significant chilling effect.

A. Laws that do not regulate expression in some manner should not be subject to overbreadth analysis.

An important threshold question is whether the claimed chilling effect on speech is an overbreadth issue at all. A typical overbreadth challenge involves a law that, in addition to proscribing unprotected activities, can also be applied to protected activities. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Broadrick v. Oklahoma*, 413 U.S. 601, 606–07 (1973). But the *Mitchell* court's concern here is not that the statute is overbroad because it can be applied to protected expression. It is concerned that **proper** applications of the statute, and indeed the very existence of this otherwise proper statute, have an incidental chilling effect. The State has not found a single case in which this Court has applied overbreadth analysis to a regulation with such an indirect effect on speech.

The point here is not that laws like the Wisconsin penalty enhancer will wither under overbreadth analysis; they can certainly withstand examination. The point is that the myriad of laws which make motive (or other mental states) an issue should not be subjected to law-by-law scrutiny in the first place. Any other conclusion leads to the absurd result that First Amendment overbreadth analysis is required for every law that directly or indirectly makes motive an issue. *Cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 708 (1986) (O'Connor, J., concurring). There is no reason to open that floodgate.[5]

B. Even if this Court chooses to examine the Wisconsin penalty enhancer for overbreadth, it will find no significant chilling effect.

Declaring a statute invalid on its face because of overbreadth is "strong medicine" that should be used by courts with hesitation and then "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When a statute, like the one here, seeks to regulate conduct, the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

The *Mitchell* majority held that the Wisconsin penalty enhancer is overbroad because the use of a defendant's

[5]*Cf. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991), in which Justice Scalia opined that the challenged law did not merit First Amendment scrutiny at any level because on its face it was a "general law regulating conduct and not specifically directed at expression." He states that a "general law" is one that regulates "without regard to whether that conduct is expressive." *Id.* at 2465 n.3 (Scalia, J., concurring).

words as circumstantial evidence to prove intentional selection at trial chills speech and other activities protected by the First Amendment. The court was concerned that the entire population is chilled because people cannot be sure they will not some day be charged under the penalty enhancer (J.A. 45-46). This general chilling effect is allegedly caused by the specter of a criminal proceeding that scrutinizes a lifetime of speech and other First Amendment activity. *Id.* The court was also worried that the penalty enhancer chills criminal offenders from uttering epithets during their crimes (J.A. at 44-45).

As to the court's concern with a general chilling effect on society, the State has two replies. First, it is improbable, to say the least, that citizens will think: "I better not read this book (or speak these words) because some day I might be charged with a criminal offense under circumstances in which it appears I selected my victim because of the victim's status." It is implausible that any significant number of people would alter their habits based on the possibility of being charged with a crime involving discrimination.

Second, if the chilling effect argument of the *Mitchell* majority is valid, it applies equally to criminal prosecutions generally and to lawsuits under countless other civil and criminal anti-discrimination laws. This Court has pointed out that in Title VII actions, an employer's "stereotyped remarks" regarding a female employee "can certainly be *evidence* that gender played a part" in a negative employment action. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Thus, speech evidence has long been introduced in both civil and criminal courts for the very same reasons it is most frequently relevant under the Wisconsin enhancer statute: to prove motive and intent.

Relevant speech and association evidence is commonly admitted at trial with explicit consideration of its impact on First Amendment rights[6], and without such consideration.[7] Likewise, courts often exclude irrelevant speech evidence without specific mention of

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[6]*United States v. Abel*, 469 U.S. 45 (1984) (evidence of the defendant's beliefs and his affiliation with the Aryan Brotherhood properly admitted on issue of defendant's credibility); *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979) (upholding decision to admit a book into evidence while recognizing "the sensitive nature of First Amendment values"); *Jordan v. Wilson*, 662 F. Supp. 528 (M.D. Ala. 1987), *rev'd on other grounds*, 851 F.2d 1290 (11th Cir. 1988) (statements made by mayor and police chief to the press).

[7]*See generally United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992) (in a prosecution under 42 U.S.C. § 3631(a), items seized from defendant's home with racist symbols and words admitted to show defendant's motive was racial hatred); *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990) (evidence in discrimination crime prosecution that defendant asked to join a "skinhead" picnic admitted to show defendant would act on his beliefs); *United States v. Johns*, 615 F.2d 672 (5th Cir.), *cert. denied*, 449 U.S. 829 (1980) (evidence of affiliation with the Ku Klux Klan admitted to prove racial animus); *United States v. Franklin*, 704 F.2d 1183 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983) (speech evidence showing defendant hated blacks offered to prove racial motive); *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989) (evidence of membership in white supremacist hate group and speech admitted to prove victims were selected because of their race); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (defendant's prior statements admitted to prove he acted with racial intent when firebombing the home of a black family); *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986) (evidence of anti-Oriental statements admitted to prove racial motive for killing).

the First Amendment.[8] Speech evidence is not admitted wholesale; it must be relevant to an issue and its probative value must outweigh any improper prejudicial effect. *See* Fed. R. Evid. 402 and 403, and Wisconsin counterpart rules: Wis. Stats. §§ 904.02 and 904.03 (1989–90).

The admission of speech evidence has not led to a trampling of First Amendment rights. For example, employer speech has long been used by employees to prove labor violations under the National Labor Relations Act. But there is no suggestion that employers have censored their speech because it could be used against them. "Employers have actively campaigned against unions in the face of the [National Labor Relations] Board's practice of considering those lawful campaigns as background evidence to determine unlawful motive." Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 Ohio St. L.J., at 35–36 (1992).

Perhaps more to the point here, no one would suggest that the National Labor Relations Act is invalid on its face because employer speech is frequently used as evidence under the act. "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, ***evidenced***, or carried out by means of language, either spoken, written, or printed.'" *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (emphasis added)

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[8]*See generally United States v. McCrea*, 583 F.2d 1083 (9th Cir. 1978) (trial court erred in admitting two books into evidence); *Ebens*, 800 F.2d at 1433 (prejudicial and erroneous admission of racial statements because they were too general and too remote in time).

(quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

As to the chilling effect on criminals who wish to utter epithets during the commission of a crime, the State responds twofold. First, it is easy to avoid this alleged chilling effect: do not commit a crime! Similarly, "those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Scalia, J., concurring).

Second, it is unrealistic to believe there is any significant chilling effect on a person who is already committing a criminal act, that is, one who is already undeterred by the prospect of a criminal prosecution for the underlying crime. In fact, self-censorship frequently defeats a central goal of the offender: letting victims know they are being singled out on account of status. The youths who form a roving band of "gay bashers" want their victims to know and feel their contempt. The person who vandalizes a Jewish temple wants to demonstrate his disdain for Jewish people and will, accordingly, use derogatory words or symbols that show the temple was not a random target. It is sadly ironic that self-censorship is unlikely precisely because it is self-defeating.[9]

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[9]In an attempt to bolster its chilling effect holding, the *Mitchell* majority asserts that the penalty enhancer is applicable when "A strikes B in the face" and adds a single word such as "'nigger,' 'honkey,' 'jew,' 'mick,' 'kraut,' 'spic,' or 'queer'" (J.A. 44). But if this is all that is known, the State cannot prove intentional selection based on status. The statute does not authorize penalty enhancement for speaking an epithet or having contempt for a victim because of their status. The State must prove the offender selected "because of" the status, and that proof is not present every time a racial, ethnic or other epithet is uttered during the commission of a crime.

The *Mitchell* majority's claim, that First Amendment rights will be stifled by the use of speech at the trial stage, presumably extends to the sentencing phase of a criminal proceeding as well. But just as this assertion is unfounded when applied to the trial portion of a criminal proceeding, it is without merit at sentencing. As discussed in section I. of this brief, this Court held in *Dawson* that activities protected by the First Amendment may be used as evidence at sentencing if sufficiently related to the crime committed. *Dawson v. Delaware*, 112 S. Ct. 1093, 1098 (1992).[10] But if the *Mitchell* majority is correct, this Court should have held that evidence of activities protected by the First Amendment is *per se* inadmissible at sentencing because admission has a chilling effect on the exercise of such rights.

The routine use of speech evidence (in the absence of a discrimination crime penalty enhancer) inevitably

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[10]*See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding the trial court's consideration of a black defendant's association with the Black Liberation Army in sentencing him to death for his murder of a white victim); *State v. J.E.B.*, 469 N.W.2d 192, 200 (Wis. Ct. App. 1991), *cert. denied*, 112 S. Ct. 1484 (1992) (finding no First Amendment violation where the trial court considered the defendant's reading materials at sentencing because of the nexus between the crime committed and the content of the reading materials); *cf. Commonwealth v. Abu-Jamal*, 555 A.2d 846, 859 (Pa. 1989), *cert. denied*, 111 S. Ct. 215 (1990) ("Punishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry.")

leads to an observation the *Mitchell* majority has steadfastly ignored. That is, even if Wisconsin had never enacted a discrimination crime penalty enhancer, Todd Mitchell's speech would have been admitted at his trial to prove his crime and his motive. Additionally, Mitchell's words could have been introduced at sentencing to shed light on the true nature of his crime and the danger he poses to the community. Since his speech could have been used against him in the absence of an enhancer, it cannot be seriously argued that Todd Mitchell, or anyone else, is chilled by the existence of a discrimination crime penalty enhancer.

The Wisconsin penalty enhancer has no significant chilling effect on speech. Todd Mitchell had the right to think whatever he wished. He could have expressed those thoughts in countless ways protected by the First Amendment. But he had no right to direct an attack on Gregory Reddick because of the color of Reddick's skin. The State was entitled to view his act as a criminal act of discrimination and punish it accordingly. The Wisconsin penalty enhancer is valid on its face and should be affirmed by this Court.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be vacated and the case remanded.

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Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

No. 92-515

In The

Supreme Court of the United States

October Term, 1992

WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Wisconsin

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1 Edward J. Devitt et al., *Federal Jury Practice and Instructions*, § 17.06 (4th ed. 1992) 11

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Hate-Crime Charge Dropped Against Black Man in Florida, N.Y. Times, Aug. 31, 1991, at 10, col. 6 36

Martin B. Margulies, *Intent, Motive and the R.A.V. Decision*, Crim. Just. Ethics, Summer/Fall 1992, at 42 11

Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, Crim. Just. Ethics, Summer/Fall 1992, at 29 10

Ralph S. Brown, *Susan Gellman Has It Right*, Crim. Just. Ethics, Summer/Fall 1992, at 46 13

Sandra Coliver, *Hate Speech Laws: Do They Work? in Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* 363 (Sandra Coliver et al., eds., 1992) 36

Super Bowl Sunday: A Day for Fans, Food, Fun – And Domestic Violence, Chi. Trib., Jan. 29, 1993 20

Susan Gellman, *"Brother, You Can't Go to Jail for What You're Thinking": Motives, Effects, and "Hate Crime" Laws*, Crim. Just. Ethics, Summer/Fall 1992, at 24 17

Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333 (1991) 34, 36

STATEMENT OF THE CASE

Respondent Todd Mitchell accepts the facts as outlined by the Wisconsin Supreme Court, with the following additions:

On October 7, 1989, a group of people gathered at the Renault apartment complex in Kenosha, Wisconsin. Todd Mitchell did not join the group until about forty-five minutes later. (R. 56: 80; 65: 5, 116-19, 122). Some had watched the movie "Mississippi Burning" and were discussing it. They particularly noted the part in which a white man hit a black child who was praying. (R. 65: 120-21).

A witness testified that at one point Mr. Mitchell asked "was they hyped up to do something?" (R. 65: 123). On redirect, that witness amended the statement to: "Do you all feel hyped up to move on some white people?" (R. 65: 128). He also testified that Mr. Mitchell said, "There goes a white boy; go get him." (R. 65: 124). As Todd Mitchell stood in the parking lot of the apartment complex, a group of eight to ten young, black males ran across the street and beat a young, white male, Gregory Reddick, who was passing by. Mr. Mitchell never crossed the street during the attack. (R. 56: 71, 76). One of the juveniles stole Mr. Reddick's sneakers. (R. 56: 71; 65: 11-12). Mr. Mitchell then flagged down a police officer and directed him to the injured boy. (R. 56: 71, 76). Two witnesses testified that Mr. Mitchell told them not to go across the street. (R. 65: 17, 176-77). One heard Mr. Mitchell tell some people "they shouldn't be doing that" and "[y]ou guys should leave that boy alone. . . . " (R. 65: 16-17, 19). Mr. Mitchell appeared voluntarily at the police station and talked to police officers. He said that he regretted pointing out Mr. Reddick. (R. 59: 4, 10).

The jury found Mr. Mitchell not guilty of the battery as charged, but found him guilty of a lesser degree of battery, party to the crime, and enhanced under Wis. Stat. Section 939.645 (1989-90), the Wisconsin hate crime law. The trial court sentenced him to the maximum of two years for the battery and added two years under the penalty enhancer. (R.

92; 93; J.A. 30 n.3). The trial court rejected Mr. Mitchell's challenge to the constitutionality of the hate crime law. The Wisconsin Court of Appeals affirmed the trial court's decision. The Wisconsin Supreme Court reversed. The court held that the hate crime law violated the First Amendment directly by punishing thought and indirectly by chilling free speech. (J.A. 33).

SUMMARY OF THE ARGUMENT

The issue in this case is punishment of thought. Government cannot constitutionally increase penalties for criminal offenses solely because the defendant was motivated by bigoted thoughts and ideas of which government disapproves.

Section 939.645 of the Wisconsin Statutes has been definitively construed by the Wisconsin Supreme Court as enhancing penalty ranges for already punishable criminal conduct on the sole basis that the defendant was motivated by bias on certain state-disapproved subjects. Section 939.645 does not punish conduct *in spite of* effects upon First Amendment rights to freedom of thought, it punishes conduct more severely *because* of the exercise of those First Amendment rights. Bias elements in crimes, including the defendant's speech, may be used as evidence of neutral sentencing factors and of neutral elements of offenses, but this does not mean that bias itself may *be* an element of an offense.

The State asserts interests that it argues justify the statute's distinctions among motives. Some of these asserted interests are so general as to be applicable to virtually any criminal statute. The others refer to effects of bias-motivated conduct that amount to nothing more than the impact of the content and viewpoint of the defendant's thoughts and opinions. This Court has recently stated that such an interest cannot support regulation that draws distinctions on the basis of content and viewpoint, because what makes the harm of a bias crime "unique" is "nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2548 (1992). The content- and viewpoint-specificity of Section 939.645 is not necessary to serve any of Wisconsin's interests, because those interests may be served by neutral alternatives. Furthermore, Section 939.645 is not narrowly tailored.

Section 939.645 is overbroad. In *R.A.V.*, this Court made clear that even expression that is otherwise constitutionally punishable may not be regulated based on content and viewpoint. Therefore, even if Section 939.645 could constitutionally be applied to crimes involving violent conduct, its applicability to "fighting words" offenses renders the statute overbroad.

Section 939.645 chills speech and association protected by the First Amendment. Although a defendant's speech and associations may be introduced as evidence of other elements of a crime, prosecutions under Section 939.645 must inevitably rely virtually exclusively upon a defendant's speech and associations for proof of the bias motive.

The State fears that if this Court affirms the unconstitutionality of Section 939.645, a variety of existing civil rights laws will be subject to constitutional attack. The State's fears are baseless. The civil rights laws are not before this Court in the present case. Moreover, the civil anti-discrimination laws are readily distinguishable from Section 939.645. Those laws target discriminatory *acts*, such as firing, denial of housing opportunities or denial of access to public accommodations. Section 939.645, on the other hand, specifically targets motive alone.

Even if civil anti-discrimination laws implicated the same First Amendment concerns as Section 939.645, they would withstand strict scrutiny. Any content- or viewpoint-based distinctions that they may draw are necessary to serve compelling state interests. Criminal civil rights statutes are distinguishable because they are necessary to protect the affirmative exercise of specific constitutional and federally protected rights.

In general, anti-discrimination laws deal either with governmental, commercial, or public areas of activity, or with interference with others' exercise of federally protected rights in a manner that interferes so greatly with government action that it may be treated as a usurpation of government power. When a "selection" occurs outside these public or commercial spheres, the law does not recognize it as "discrimination."

Section 939.645 also violates the Equal Protection Clause of the Fourteenth Amendment. The statute treats persons committing the same offenses differently, solely on the basis of the exercise of their fundamental right to free thought and opinion. Section 939.645 fails strict scrutiny because the distinctions it draws are not necessary to serve a compelling state interest.

Finally, Section 939.645 is unconstitutionally vague. It gives no guidance as to its application in mixed motive situations. A subsequent amendment of the statute indicates the Wisconsin legislature's recognition that the pre-amendment statute now before this Court is ambiguous in this regard.

Justice Holmes once wrote, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled by Girouard v. United States*, 328 U.S. 61 (1946). Some of the greatest moments of this Court have occurred when it came time to put this principle into action. The present case calls for its application once again.

ARGUMENT

I. THE WISCONSIN SUPREME COURT CONSTRUED SECTION 939.645 AS PUNISHING MOTIVES.

The Wisconsin Supreme Court's construction of Section 939.645 is binding upon this Court. This Court reviews a

state's highest court's findings of unconstitutionality under the federal Constitution, but does not review the state court's interpretation of its own state's laws. *R.A.V.*, 112 S. Ct. at 2542. The Wisconsin Supreme Court construed Section 939.645 as creating enhanced penalties for existing crimes on the basis of the offender's motive, when that motive relates to a specified list of subjects.

The Wisconsin Supreme Court stated repeatedly and unequivocally that both the intent and effect of Section 939.645 was punishment of motives, and only those motives involving certain subjects and viewpoints. "The hate crime statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. . . . [I]t is clear that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor." *State v. Mitchell*, 485 N.W.2d 807, 812, 813 (Wis. 1992); (J.A. 37); *see generally id.* at 811-14. The violent or harassing conduct is already punished by the underlying offense. In fact, guilt of the conduct and of the motive must be found separately. The jury returns a special verdict on the latter. Wis. Stat. Section 939.645(3).

The court rejected the State's assertion that "the statute punishes only the 'conduct' of intentional selection of a victim," because virtually every crime includes intentional selection of a victim. As construed by the Wisconsin Supreme Court, Section 939.645 punishes only "the 'because of' aspect of the selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Id.* at 812; (J.A. 35).

The Wisconsin Supreme Court's construction of Section 939.645 sets the parameters for this Court's constitutionality analysis. That court's interpretation of the statute as punishing motive is the starting point for the strict scrutiny of the statute under the First Amendment and the Equal Protection Clause, and for Mr. Mitchell's overbreadth and vagueness challenges.

II. SECTION 939.645 PUNISHES OFFENDERS' THOUGHTS BY SINGLING OUT FOR EXTRA PUNISHMENT CERTAIN MOTIVES ON THE BASIS OF THEIR CONTENT AND VIEWPOINT, IN VIOLATION OF THE FIRST AMENDMENT.

A. SECTION 939.645 PUNISHES BIGOTED THOUGHT AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

1. Section 939.645 imposes greater penalties solely on the basis of the content and viewpoint of the offender's motive.

Justice Black, in his famous dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952), recognized the dangers of sacrificing liberty for a laudable goal:

> The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."

Section 939.645 punishes thought. It enhances penalties based upon the defendant's motives when those motives represent a viewpoint or belief on certain enumerated subjects. Although those viewpoints and beliefs are widely considered reprehensible, the First Amendment does not allow Wisconsin to express its disapproval by punishing them.

Accordingly, the Wisconsin Supreme Court held Section 939.645 unconstitutional. "[T]he hate crimes statute punishes bigoted thought . . . [It] does not punish the underlying criminal act, it punishes the defendant's motive for acting. . . . [It] creates nothing more than a thought crime." *Mitchell*, 485 N.W.2d at 812, 817 n.21; (J.A. 34, 47 n.21). In striking down a similar law, the Supreme Court of Ohio reached the same conclusion:

> The predicate offenses . . . are already punishable acts under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12,

> but which is not an element of the underlying offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added). The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes.
>
> * * *
>
> R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.
>
> . . . [W]e find that the effect of R.C. 2927.12 is to create a "thought crime."

State v. Wyant, 597 N.E.2d 450, 453 (Ohio 1992) (footnote omitted).

Motive consists entirely of the defendant's thoughts and beliefs. The First Amendment shields thoughts and beliefs from punishment. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Certainly the State could not punish these thoughts and beliefs independently. That they are held by one who commits a crime "because of" them does not remove the constitutional shield. Yet, that is exactly what the statute seeks to do. Mr. Mitchell makes no claim that the constitutional protection of his thoughts protects his actions from punishment. However, the State's power to punish Mr. Mitchell's actions does not remove the constitutional barrier to punishing his thoughts.

The State attempts to distinguish this Court's recent opinion in *R.A.V.* on the ground that *R.A.V.* dealt with "speech," albeit "unprotected" speech, and this case deals with "conduct." Contrary to the State's position, the principle underlying *R.A.V.* applies with equal force to Section 939.645. Government may not punish viewpoint and belief, even when they are associated with punishable acts. Whether those acts are speech or nonspeech is irrelevant.

In *R.A.V.*, this Court held that even racist "fighting words," although "unprotected" speech, may not be treated more severely than other fighting words on the basis of their content or viewpoint. The same is true, said this Court, for "expressive conduct": "We have long held . . . that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses. . . . " 112 S. Ct. at 2544. *See also Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310, 314-17 (1990); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969).

Government may not punish or regulate "pure speech" because of its disapproval of the ideas expressed. *R.A.V.*, 112 S. Ct. at 2542. *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). The same principle logically applies to conduct, even criminal conduct. It may not be punished more severely solely because it carries a government-disapproved message or because of the content or viewpoint of the actor's thoughts. Thus, this Court's decision in *R.A.V.* is not distinguishable on the ground that the ordinance at issue in *R.A.V.* dealt with "speech" as opposed to "conduct."[1]

Similarly, the area of disagreement between the *R.A.V.* majority and the Justice White concurrence, whether strict scrutiny is ever applicable in traditionally "unprotected" categories, is not at issue in the present case. Even under Justice White's view of the categorical approach, a law punishing thought and belief, as Section 939.645 does, is subject to strict scrutiny. The entire taxonomy of "pure speech," "unprotected speech," "expressive conduct," and "pure conduct" is simply not at issue here, because the State's power to punish the underlying acts, whether "conduct" or "speech," is

[1] Indeed, while the St. Paul ordinance in *R.A.V.* was construed to reach only punishable speech, the defendant in that case had engaged in the conduct of burning a cross; in the present case, wherein the State argues that the statute reaches only pure conduct, the defendant's action consisted entirely of punishable speech.

not disputed, despite any incidental impact on First Amendment rights.

Strict scrutiny is not invoked by the character of the underlying acts, but by the protected character of the single factor triggering the imposition of the *additional* punishment: a bigoted motive. The defendant's disfavored thoughts and beliefs are unquestionably within a protected category under the First Amendment, even when the defendant has also committed a crime. The question, therefore, is not how speech may be treated differently from conduct, or "protected speech" differently from "unprotected speech," or "expressive conduct" differently from "nonexpressive conduct."

Rather, the threshold question is this: within *any* of these categories, may bigoted motive be separately punished, in addition to the punishment for the underlying act? Even in a completely regulable category, not every possible added factor would be constitutionally punishable. For example, in punishing theft, the state may increase penalties based upon the value of the property stolen or use of a dangerous weapon, but not based upon the race or political affiliation of the defendant or the social prominence of the victim.

Some "pure speech" can be treated differently from other "pure speech" based upon factors such as time, place, and manner, but not based upon its content or viewpoint. *R.A.V.*, 112 S. Ct. at 2544-45; *Simon & Schuster*; *Collin v. Smith*, 578 F.2d 1197, 1201-02 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). Some "unprotected speech" may be treated differently from other "unprotected speech" based upon secondary effects, *R.A.V.*, 112 S. Ct. at 2546-47, 2549, but not because of its content and viewpoint. Some "expressive conduct" may be treated differently from other "expressive conduct" because of its "non-communicative aspect," *United States v. O'Brien*, 391 U.S. 367, 376 (1968), but not because of its content and viewpoint. *Texas v. Johnson*; *United States v. Eichman*, 496 U.S. at 315-17. By the same token, government may not treat even otherwise punishable conduct differently from other punishable conduct solely because of its content

and viewpoint – not because the conduct is protected by the First Amendment, but because the content and viewpoint are.

This Court has always recognized that freedom of speech necessarily presupposes and includes the freedom to think, to believe, and to disagree. *See, e.g., Wooley v. Maynard*, 430 U.S. at 705; *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 234-35 ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."). *See also* Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, Crim. Just. Ethics, Summer/Fall 1992, at 29.

Section 939.645 adds years to criminal sentences based upon the content of the offender's thoughts and beliefs. Only the State's disfavored topics of race, religion, color, disability, sexual orientation, national origin, or ancestry trigger the statute's operation. The First Amendment does not permit government to impose special prohibitions based on disfavored subjects. *R.A.V.*, 112 S. Ct. at 2547; *Simon & Schuster*, 112 S. Ct. at 509. The State could not enact a penalty enhancer that applies whenever an offender is motivated by his viewpoint on abortion or his opposition to United States foreign policy.

Like the ordinance struck down in *R.A.V.*, Section 939.645 "goes beyond mere content discrimination, to actual viewpoint discrimination." *Id. See also Wyant*, 597 N.E.2d at 213. Wisconsin incorrectly contends that the law is not even content-based, let alone viewpoint-based, because "[t]he Wisconsin law does not single out any belief or type of message a criminal might communicate by his or her crime." Brf. Pet. at 38. Elsewhere, though, the State acknowledges that the statute is both content- and viewpoint-based by declaring that the statute is directed toward "bias-motivated action" and "racist attack[s]." Petition for Certiorari at 16, 18. In the Wisconsin Supreme Court, the State "admit[ted] that this case involves legislation that seeks to address bias related crime." *Mitchell*, 485 N.W.2d at 814; (J.A. 40).

The State further admits the statute's content and viewpoint specificity by asserting that its interest is in punishing offenses that spread "fear," "distrust," and "resentment." Brf. Pet. at 27. In *R.A.V.*, this Court found that nearly identical language bespoke content and viewpoint specificity. 112 S. Ct. at 2548. In *R.A.V.*, the Supreme Court of Minnesota had held that the St. Paul ordinance was directed at "group hatred." *Id.* at 2548. In the present case, the Supreme Court of Wisconsin held that the aim of Section 939.645 was the same: "The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance." *Mitchell*, 485 N.W.2d at 815; (J.A. 42). In *Wyant*, the Supreme Court of Ohio observed: "If the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?" 597 N.E.2d at 457.

2. Motive is distinct from intent and purpose.

Criminal statutes commonly employ the mental element of "intent" or "purpose." The Wisconsin Supreme Court's distinction of intent and purpose from motive has long been recognized as significant in criminal law. The court's explanation, 485 N.W.2d at 813 n.11; (J.A. 37), is virtually identical to that set forth in the federal jury instructions:

> Intent and motive are different concepts and should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.
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> * * *
>
> The motive of the defendant is, therefore, immaterial except insofar as evidence of motive may aid in the determination of state of mind or the intent of the defendant.

1 Edward J. Devitt et al., *Federal Jury Practice and Instructions*, Section 17.06 (4th ed. 1992). *See also* Martin B. Margulies, *Intent, Motive, and the R.A.V. Decision*, Crim. Just. Ethics, Summer/Fall 1992, at 42.

The criminal law is appropriately concerned with intent, because intent measures an actor's culpability based on volition. It determines whether an offender's crime resulted from conscious choice, recklessness, or inadvertence. Because intent measures culpability, differences in punishment based on intent are appropriate. Motive, by contrast, does not affect *mens rea*; one may act purposefully, knowingly, recklessly, or negligently, all with the same motive or with none. The *Wyant* court observed that "one can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psycopath, [sic] on the other hand, may intend to kill but have no motive." 597 N.E.2d at 454.

Intent and purpose affect the "what" of conduct. Motive is the "why" of conduct. Motive is nothing other than the thoughts and beliefs prompting the offender to act. Although motive often plays a part in criminal trials, it is not an element itself, but is used as evidence of other neutral elements such as identity and intent.

The State argues that other motives are criminalized, and therefore the motives singled out by Section 939.645 may be, too. The State's examples, however, do not support its position. The first, penalty enhancement for batteries against police officers, does not depend upon motive (or, for that matter, any other possible definition of "intentional selection" of victims "because of" their status as police). The offender could be unaware that the victim is an officer; or know it, regret it, and proceed *in spite of* that fact; the enhancement would still apply.

The State's other example, murder for hire as a death penalty specification, is also inapposite. The State cites to *Jurek v. Texas*, 428 U.S. 262 (1976), which was about the general constitutionality of a capital sentencing procedure that included murder for hire as a statutory aggravating circumstance. That procedure did not authorize the death penalty "if an offender was motivated by the desire for money," as paraphrased by the State. The actual language was: "the person committed the murder for remuneration or the promise of remuneration *or employed another to commit the murder*

for remuneration or the promise of remuneration." *Id.* at 265 n.1 (emphasis added). The aggravating factor applies equally to the one who hires the killer. This person is not motivated by a desire for money. The Texas statute at issue in *Jurek*, like those of many other states, does not turn on motive, but on the objective act of formation of a contract to murder. As the Ohio Supreme Court recognized in *Wyant*, "[t]he greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished." 597 N.E.2d at 455.

In any case, even if government could constitutionally punish some motives, Section 939.645 would still be unconstitutional, because it punishes motives on a content- and viewpoint-specific basis. "Pecuniary gain," for example, even if viewed as a motive rather than a purpose, does not implicate the defendant's opinions or beliefs. Revenge, fear, greed, necessity and self-defense similarly implicate no First Amendment concerns. Bigotry, by contrast, while reprehensible, is doubtless a viewpoint on a political and social issue. "[W]hen the motive's kernel is exposed, and it reveals a political or social belief system that we are compelled to tolerate, then . . . [government] may not make such a belief the essence of a crime." Ralph S. Brown, *Susan Gellman Has It Right*, Crim. Just. Ethics, Summer/Fall 1992, at 46, 47.

In *R.A.V.*, this Court invalidated the St. Paul ordinance because it punished offenders specifically because their conduct "contain[ed] messages of bias-motivated hatred." 112 S. Ct. at 2548. Thus the ordinance discriminated on the basis of viewpoint.

3. Section 939.645 is not within the rule of *United States v. O'Brien*.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court upheld David O'Brien's conviction for destroying his draft card, despite the incidental impact on his freedom of expression. The government's interest in insuring the efficient functioning of the Selective Service System was unrelated to

the suppression of belief or expression. By contrast, Wisconsin is not regulating conduct *despite* its expressive elements, but punishing already proscribed conduct more severely *because* of its expressive elements. This is precisely the result forbidden by the First Amendment.

Indeed, even in reversing the appellate court's decision in *O'Brien*, this Court stressed that the statutory provision at issue prohibited the willful destruction of draft cards

> and does nothing more. In other words, both the governmental interest and the operation of the [law] are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, *and for nothing else*, he was convicted.

391 U.S. at 381-82 (emphasis added). *See also United States v. Lemon*, 723 F.2d 922, 937-38 & n.46 (D.C. Cir. 1983).

David O'Brien could not have received additional penalties for having violated the statute "because of" his opposition to the Vietnam War.[2] *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991). *See also Wayte v. United States*, 470 U.S. 598, 610 (1985). For this reason, Wisconsin's attempt to analogize its hate crime enhancement law to the draft card destruction law in *O'Brien* is flawed. The proper analogy would compare hate crime enhancement to a law which punished draft card destruction but increased the penalties when

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[2] It is noteworthy that the statutory amendment upheld in *O'Brien* did not create greater penalties for wilful destruction of a draft card than for the already prohibited acts of forgery or alteration of a draft card. *See O'Brien*, 391 U.S. at 387 (Appendix to opinion). This differs from Section 939.645, which greatly increases the potential penalties for offenses when a bias motive exists.

the burning was motivated by opposition to government policies.

This Court recently adhered to this reasoning even while upholding a statute under the First Amendment. In *Barnes v. Glen Theatre*, the challenged statute survived only because it treated expressive and nonexpressive nudity exactly alike. The statute did not specifically ban nude dancing: "Public nudity is the evil the state seeks to punish, *whether or not* it is combined with expressive activity." 111 S. Ct. at 2463 (emphasis added). Justice Scalia, concurring, stressed that:

> Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. . . . As we clearly expressed the point in *Johnson*: "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements."

Id. at 2466 (quoting *Texas v. Johnson* at 406).

In Section 939.645, by contrast, the governmental interest and the operation of the law are not limited to the "noncommunicative aspect" of the defendant's conduct. That noncommunicative aspect is what is already punished by the underlying criminal statutes. Section 939.645 is directed toward the "communicative impact" of the crime. Although the State claims that its interest is in punishing the effects of these offenses, Section 939.645 does not punish effects. Rather, it punishes the defendant for the communicative impact of his bigoted thoughts, or, even worse, for simply having had those thoughts. If the bigoted motive is in no way communicated to the victim or others, then Wisconsin's asserted interest is not served by punishing it.

Mr. Mitchell does not argue, as did Mr. O'Brien, that his thoughts and the expressive elements of his actions shield his otherwise punishable conduct from prosecution under the battery statute. He contends only that his thoughts and expression may not be used to subject him to an additional punishment. Moreover, the tail surely wags the dog here: under Section 939.645, Mr. Mitchell was subject to three and one

half times the maximum penalty he could have received for the same battery committed "because of" some other motive.

4. *Dawson v. Delaware* and *Barclay v. Florida* do not stand for the proposition that bigoted motive may be an element of a criminal offense.

The State erroneously relies on *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983). The State reasons that since racist motivation is a factor that may properly be considered at sentencing, it follows that racist motive may properly be the subject of a penalty enhancer. The State's logic is flawed in two respects. First, the State misreads *Dawson* and *Barclay*, and second, the State fails to recognize the fundamental difference between considering a factor in the context of sentencing and separately punishing it by making it the subject of a penalty enhancer.

In *Dawson* and *Barclay*, this Court simply clarified that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing," where that evidence might be relevant in proving *other*, content-neutral factors. For example, a sentencing judge could consider beliefs which demonstrate the defendant's lack of remorse, the effects on victims, risk of death to many people, or that the offense was committed "in a particularly cruel and heinous manner." *Dawson*, 112 S. Ct. at 1097, 1098. In sentencing, these effects must be shown actually to have occurred in the individual case. Bias motive cannot be used as a per se surrogate for the effects, as it is in Section 939.645. *Dawson* and *Barclay* do not say that a statute that would require enhanced penalties on the basis of motive would be constitutional, nor do these decisions support the proposition that an offender's bigoted motive may, all alone, be used to automatically convert a misdemeanor to a

felony, subjecting the offender to several years in prison and all of the other consequences a felony conviction entails.[3]

A judge deciding what sentence to impose within a penalty range already set by the legislature has broad discretion to consider a wide range of relevant material. *Dawson*, 112 S. Ct. at 1097. However, it does not follow that any factor that a sentencing judge may consider may be singled out as the subject of a penalty enhancer that automatically exposes the offender to a substantial increase in the potential penalty.

For example, a sentencing judge may consider such factors as "education," "home and neighborhood," "employment," and "religion." *Williams v. New York*, 337 U.S. 250, n.15 (1949). The fact that an offender has only a fourth grade education, is unemployed, or lives in a poor neighborhood may indicate that the offender will be unable to secure gainful employment and is likely to commit future crimes. However, the State could not enact a penalty enhancer that is triggered whenever the offender is poorly educated, unemployed, or lives in a certain neighborhood. Similarly, while an offender's religious background may be relevant to remorse or likelihood of rehabilitation, a state may not enact a penalty enhancer that permits a longer sentence whenever the offender is an atheist.

It has long been accepted, and Mr. Mitchell does not dispute, that First Amendment-protected activity may be introduced as evidence of neutral elements, even at the guilt phase. However, this Court did not expand upon this principle in either *Dawson* or *Barclay* to say that the defendant's racial motive could itself *be* a sentencing factor, much less an element of a punishable offense. *See* Susan Gellman, *"Brother, You Can't Go to Jail for What You're Thinking"*:

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[3] By converting Class A misdemeanors to felonies, the hate crime law does far more than enlarge the discretion of the sentencing judge. In Wisconsin, conviction of a felony carries substantial collateral consequences, including loss of the right to vote and other civil rights. *See* Wis. Const. art. XIII, section 2.

Motives, Effects, and "Hate Crime" Laws, Crim. Just. Ethics, Summer/Fall 1992, at 24, 25-26. In fact, the *Dawson* dissent characterized the majority's opinion as holding that "the First Amendment *limits* the aspects of a defendant's character that [sentencing courts and juries] may consider." 112 S. Ct. at 1104 (Thomas, J., dissenting) (emphasis added). As both *Dawson* and *Barclay* make clear, even the introduction of a defendant's bigotry as evidence of a content-neutral sentencing factor must be undertaken only with utmost caution and under very limited circumstances.

Dawson and *Barclay* allow a sentencing court to consider any motive relevant to content-neutral sentencing factors. Section 939.645, by contrast, creates an irrebuttable presumption that only those motives targeted by the statute could ever create the extra harm that warrants the increased penalty range. Thus, a Wisconsin judge, sentencing a batterer, would be able to consider the extra effects caused by the defendant's having selected the victim on the basis of any status, but if the status were sex, poverty, seeking an abortion, or anything else not listed in Section 939.645, the judge would be limited to a two year maximum for battery.

B. THE HATE CRIME LAW DOES NOT SURVIVE STRICT SCRUTINY.

If a statute which facially proscribes thought based on content or viewpoint can ever be constitutional, it must survive strict scrutiny. *Simon & Schuster*, 112 S. Ct. at 509.[4] Under the strict scrutiny standard, the law can only be upheld if its content-and viewpoint-specificity is necessary and narrowly tailored to serve a compelling state interest.

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[4] Justice Kennedy, concurring in *Simon & Schuster*, noted that strict scrutiny is traditionally part of equal protection and not First Amendment jurisprudence, and that content-based regulations of speech are not permissible, even if they could survive strict scrutiny. 112 S. Ct. at 512.

1. Wisconsin's asserted state interests do not justify a content- and viewpoint-specific statute.

The State sets forth several interests that it contends justify the punishment of motive in Section 939.645. Most of these purported interests are being raised for the first time before this Court, raising the question whether they are, in fact, the State's true interests supporting the statute. The first two interests the State sets forth, retribution and deterrence, are so general that they can be asserted with equal force to justify any criminal statute. If the State's desire to punish and deter crime were a sufficient interest to overcome strict scrutiny, then any criminal law would survive, including the ordinance at issue in *R.A.V.* The State's retribution argument simply reasserts that government can constitutionally proclaim some motives more "depraved" than others, solely on the basis of their content and viewpoint on certain subjects. The First Amendment prohibits government from making such distinctions. *See R.A.V.*, 112 S. Ct. at 2547-48.

The State asserts that "violations that occur with increasing frequency merit penalties with a greater deterrent effect," and assumes that "[t]here is no serious dispute that discrimination crimes are occurring with greater frequency." Brf. Pet. at 23. However, the statistics do not support the State's assumption. The most recent audit by the Anti-Defamation League ("ADL") reports that nationally anti-Semitic incidents decreased by 8% in the last year. ADL, *1992 Audit of Anti-Semitic Incidents*, 3 (1992) (hereinafter "ADL 1992 Audit").

The ADL 1992 audit reveals that there was, at best, no correlation between laws similar to Section 939.645 and decrease in anti-Semitic incidents from 1991 to 1992. Indeed, states without such laws did somewhat better. Of states with these laws, 38% reported an increase in anti-Semitic vandalism, 45% reported a decrease, and 17% had no change. Of states without these laws, 30% reported an increase, 48% reported a decrease, and 22% had no change. *Id.* at 10-11, 42, 44, 45.

Data compiled by the State of Wisconsin Sentencing Commission reveals that there were only four felony convictions under the hate crimes law from January 1, 1987 through December 31, 1991. Two of those convicted were Todd Mitchell and his brother Jermaine, who were involved in the incident underlying this case.[5]

The FBI released statistics pursuant to the Hate Crimes Statistics Act of 1990 for the first time on February 4, 1993.[6] The data were supplied by 2,771 law enforcement agencies in 32 states. "Hate crime occurrences" were reported in only 27% of the jurisdictions. Wisconsin, with 303 participating agencies, the highest number next to New York, reported 41 incidents, a low number among reporting states. This number did not reflect arrests, charges, or convictions, but only reported occurrences, mostly of graffiti or minor vandalism. Thus, contrary to the State's assertions, the available data suggest that hate crimes occur infrequently in Wisconsin.

Similarly, Wisconsin asserts that such crimes "are more likely than other crimes to provoke further crime in the form of retaliatory crime or copycat crimes." Brf. Pet. at 24. However, "responsive violence fears" cannot support content- and viewpoint-based restrictions. *Collin v. Smith*, 578 F.2d at 1203. Motives, like all First Amendment activity, cannot be regulated on the basis of conclusory and speculative assertions of possible future harm. *Brandenburg v. Ohio*, 395 U.S. 447 (1969); *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992). Even statistical evidence of the likelihood of that harm actually occurring does not permit regulation on the basis of content: pornography and even the Super Bowl have been statistically correlated to increases in violence against women, but that cannot justify their prohibition or punishment. *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Super Bowl Sunday: A Day for Fans, Food, Fun – And Domestic Violence*,

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[5] A copy of these unpublished data has been filed with the Court.

[6] A copy of the FBI news release containing these statistics has been filed with the Court.

Chi. Trib., Jan. 29, 1993, at 2. Moreover, even if it could be reasonably assumed that crimes motivated by bias are more provocative than crimes motivated by greed or need, it cannot be presumed that crimes motivated by the subjects enumerated in Section 939.645 are more provocative of retaliation or imitation than crimes motivated by politics, gender, abortion, environmental concerns, or antiwar sentiment.

Likewise, the State asserts that hate crime offenders "are generally more likely than other offenders to pose a danger of repeat criminal behavior" and "are less likely than most offenders to feel true remorse." Brf. Pet. at 24 and 25. The State's interest in recognizing future dangerousness and lack of remorse in offenders under Section 939.645 is no greater than the same interest with regard to offenders who selected their victims "because of" other reasons such as politics, gender, or abortion. It is reasonable to assume, in fact, that the defendants in *O'Brien*, *Johnson*, *Eichman*, and *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), all of whom deliberately acted to make public statements, would be at least as likely as Todd Mitchell to engage in similar conduct again and to feel no remorse for their actions.

The final interest claimed by the State, prevention and redress of the assertedly unique effects of bias crimes on victims and others of their "targeted groups," is the interest it asserted in the courts below. The State asserts that this unique harm consists of causing "members of the targeted group [to] feel a loss of security," and creating "fear and terror" in the victim. Brf. Pet. at 25, 26. These effects occur with almost every crime. When they occur as a result of an offense under Section 939.645, as this Court recognized in *R.A.V.*, the additional harm consists of the impact of the defendant's beliefs, and the offensiveness of their communication. This harm may well be both real and significant, but the beliefs and their communication are still squarely within the protection of the First Amendment. *See* 112 S. Ct. at 2548. Thus, even if the injuries suffered by the victim or others from violations of Section 939.645 are "qualitatively different" from the injuries caused by crimes with other motives, the essence of that qualitative difference is something that the government has no power to punish.

In *Collin v. Smith*, the Seventh Circuit rejected the same argument that Wisconsin makes here. The Village of Skokie argued that its challenged ordinances were justified by "a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents." 578 F.2d at 1205. Although the court did not deny the reality of the problem, it rejected Skokie's argument:

> [A]ny shock effect . . . must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

Id. at 1206. Although the *Collin* decision dealt only with "a silent march, attended only by symbols and not by extrinsic conduct offensive in itself," 578 F.2d at 1206,[7] the same principle applies to Section 939.645. Indeed, if government can point to the harmful effects of "a distinctive idea" as a compelling state interest justifying punishment of motives, there is no reason it could not point to those same harmful effects to justify punishing not only Nazi marches, but bigoted books, speeches, and associations as well. A Nazi demonstration in Skokie or distribution of *Mein Kampf* would have effects at least as terrifying and widespread as would a battery in which the victim was selected "because of" being Jewish.

The Satanic Verses causes "special harms" that *Moby Dick* does not; "The Last Temptation of Christ" spread resentment that "E.T." did not; Robert Mapplethorpe's art is more "depraved" than Norman Rockwell's; a speech by Louis Farrakhan is more likely to provoke retaliation than a speech by Bill Cosby. The State has the same compelling interest in redressing the same "special harm" regardless of how it is caused. The State may not constitutionally enact a law stating that "No person shall publish a book that he knows or should

[7] Note, however, that *Street v. New York*, 394 U.S. 576 (1969), from which the court took its "shock effect" language, was a flag-burning case.

know is likely to create the same types of harms as are created by a violation of Section 939.645." Although the State's interest would be identical to the interest it asserts here, it could not treat bigoted books differently than other books. Such a law cannot survive strict scrutiny simply because bigoted books create special harms. Similarly, Section 939.645 cannot survive strict scrutiny simply because bigoted crimes create special harms.

In *Texas v. Johnson*, the State of Texas asserted a similar compelling state interest in preventing the special harm created by flag burning, not created by other unlawful burnings, to justify its flag-burning statute. This Court summarized that interest as "a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." 491 U.S. at 408. This Court rejected that argument:

> Our precedents do not countenance such a presumption. . . . It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported assumption that their very disagreeableness will provoke violence.

Id. at 408-09. Similarly, in *R.A.V.*, this Court stated that tendency to provoke a violent response "would not justify selective regulation under a 'secondary effects' theory. The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message." 112 S. Ct. at 2549, n.7.

In both *Texas v. Johnson* and *United States v. Eichman*, this Court recognized that politically motivated flag burnings can create a distinct type of harm that otherwise motivated flag burnings (such as the respectful burning of an irreparably damaged flag) do not. However, that harm consists of "serious offense to others"; the flag burning statute was "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity." *Texas v. Johnson*, 491

U.S. at 411, 412 n. 7. The flaw in this asserted justification is not that the harm is not real, unique, and serious; indeed, as in the present case, the impact of antisocial sentiments may be very significant. Rather, it is the *nature* of this special harm: " '[t]he emotive impact of speech on its audience is not a "secondary effect" ' " that would justify the statute. *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). *See also R.A.V.*, 112 S. Ct. at 2549. Even the statute at issue in *Eichman*, which purported to proscribe conduct "without regard to the actor's motive," 110 S. Ct. at 2408, was unconstitutionally viewpoint-specific, because it "unmistakably connotes disrespectful treatment of the flag." *Id.* at 2409.

2. The content and viewpoint specificity of Section 939.645 is not necessary to serve a compelling state interest.

Wisconsin has completely avoided the dispositive step of the strict scrutiny analysis. The government may assert the most compelling of interests for a content- and viewpoint-based statute, but if it cannot show that the content and viewpoint specificity is *necessary* to serve those interests, then the statute is unconstitutional. *R.A.V.*, 112 S. Ct. at 2549-50. Even if Section 939.645 can be said to serve the State's asserted interests, the State offers no explanation why the hate crime law's focus on particular motives is necessary to do so, or why a neutral statute would not be adequate.

The State has at its disposal a variety of neutral approaches that would serve its asserted interests at least as well as does Section 939.645. The underlying criminal statutes already do exactly that. By definition, every act punished by Section 939.645 is already punished without respect to motive by other sections of Wisconsin's criminal code. Just as in *R.A.V.*, "[a]n ordinance not limited to the favored topics would have precisely the same beneficial effect." 112 S. Ct. at 2550.

Where, as here, the punishable conduct is already a criminal offense and the only effect of the content-based enhancer is to increase the potential penalty, the State must show that the existing range of penalties is inadequate and

cannot be made adequate by a content-neutral enhancer. The State has not attempted nor could it make such a showing. If existing maximums are inadequate, a simple content-neutral solution would be to increase the maximum penalties wherever necessary. That the State, instead, chose to enact a content-based enhancer aimed specifically at bigoted thought makes clear that the real but unspoken purpose behind Section 939.645 is to express the State's hostility to particular forms of bigotry by criminalizing them.

Furthermore, when crimes are motivated by bias, that motivation can be considered without laws such as Section 939.645. Bias motives may be used in sentencing when probative of a content-neutral factor to show that some extra harm or circumstance actually existed in that particular case. It is not used as a per se surrogate for an effect that could possibly have resulted. At the guilt phase, too, bias elements may be introduced as evidence if relevant to other issues. In the present case, had Todd Mitchell been tried for battery alone, without Section 939.645, his words and even his motives could all have been admissible on issues of identity and intent, and could even have provided the deciding weight for his conviction for battery.

Even if penalty enhancement is necessary to redress the asserted special effects of bias-related crimes, it is still not necessary that the statute turn on the content and viewpoint of the defendant's motives. Neither on its face nor as construed by the Wisconsin Supreme Court does the statute say anything at all about effects. It punishes only motive, irrespective of effects. The content- and viewpoint-specific approach of Section 939.645 is simply unnecessary, because many neutral enhancement factors that would serve the same state interests are available to the State. For example, penalties could be enhanced where:

1. The offender acted with the specific intent to create (or with knowledge that he was likely to create) terror within a definable community.
2. The offender acted with specific intent to create (or with knowledge that he was likely to create) a threat of further crime.

3. The offender knew or should have known that a victim was particularly susceptible to the criminal conduct. *Cf.* U.S.S.G. sec. 3A1.1.
4. The offender, in the commission of the offense, intended to inflict serious emotional distress.
5. The commission of the offense created serious psychological harm (comparable to "serious physical harm" specifications that enhance penalties).

Each of these formulas is content-neutral and viewpoint-neutral, and each alone or in conjunction with others would reach all the conduct contemplated by Section 939.645.[8] In fact, the federal sentencing guideline upon which the third example above is based has been used to enhance the penalty for a cross-burning offense. *United States v. Skillman*, 922 F.2d 1370, 1377-78 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 353 (1991).

Justice White, concurring in *R.A.V.*, was concerned that the *R.A.V.* majority's analysis would require an approach that ultimately would restrict *more* First Amendment activity. That concern is not raised by the neutral alternatives suggested here. Conscientious enforcement of Wisconsin's criminal code as it stands would add no new restrictions on more motives. The neutral enhancement factors outlined above do not create new "speech crimes."

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[8] Neutral approaches such as these would not reach cases in which the additional harm consisted entirely of offensiveness or expression of racist belief that could persuade others to be racist. However, Section 939.645 would be unconstitutional as applied to such cases anyway, as offensiveness that does not rise to the level of fighting words is protected by the First Amendment, and certainly expression of ideas that could persuade others is.

Indeed, not only would neutral approaches such as these examples be at least as effective as Section 939.645 in reaching its stated goals, they could also increase penalties for other particularly harmful conduct as well. Drive-by shootings, clinic bombings, poisonings of painkillers, planting of computer viruses, stalkings, and gang violence could all be subject to penalty enhancement under these examples.

The existence of facially neutral alternatives confirms the unconstitutionality of Section 939.645, just as it did the ordinance at issue in *R.A.V.*: "The existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the statute.' " 112 S. Ct. at 2550 (citation omitted, alteration in original). The State's insistence upon a statute focusing upon motive rather than effect, and only upon motives relating to certain biases, suggests that Wisconsin, like St. Paul, has another interest, unstated and improper: punishing selected bigotries. As this Court put it in *R.A.V.*, "In fact the only interest distinctively served by the content limitation is that of displaying the [government's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." *Id.* (footnote omitted).

3. Section 939.645 is not narrowly tailored.

A statute that implicates First Amendment concerns must be narrowly tailored to serve a compelling state interest. *See Simon & Schuster*, 112 S. Ct. at 511. Even assuming that Section 939.645 could be said to serve a compelling state interest, the statute would nonetheless fail strict scrutiny because it is "significantly overinclusive." *Id.* at 511. Like the "Son of Sam" law that was so overinclusive as to be applicable to the works of Henry David Thoreau and Saint Augustine, Section 939.645 reaches a wide range of situations that do not implicate any of the State's asserted compelling interests.

The hate crime law is overinclusive in that it may apply to offenses in which bigotry is only a small fraction of the motive. Although the State points out, "[i]t is one thing to batter someone who provokes you in some manner. It is quite different to single out and batter a person walking down the street *for no other reason* than contempt for the color of his skin," Brf. Pet. at 17 (emphasis added), it is not clear whether the version of Section 939.645 under which Mr. Mitchell was

convicted requires that the prohibited motive be the sole reason for the selection of the victim, a substantial reason or a minute part of the reason. If the amendment that changed the triggering language in the statute from "because of" to "in whole or in part because of" was intended to clarify the original statutory language, the overinclusiveness of the statute is particularly pronounced.[9]

Mixed motive situations are by far the most commonly encountered under laws analogous to Section 939.645. *See, e.g., State v. Wyant*; *State v. Plowman*, 838 P.2d 558 (Or. 1992). A crime motivated only in small part by bias, and that would have been committed anyway, is not a "hate crime" (or, for that matter, even a "discrimination crime") contemplated by the Wisconsin legislature. As the relative weight of the bias motive dwindles down, it approaches the point of unconscious racism, over which the offender has no control.

If the new language clarifies the meaning of the preamendment statute, then the penalty enhancer applies even when bigotry is a minute part of the motive, and the offender is motivated predominantly by some other factor. Using the State's example, the penalty enhancer would apply when an offender batters someone mostly because the victim has provoked him in some way, but in some very small part because of the color of his skin. When the victim's ethnicity is not the

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[9] 1991 Wisconsin Act 291, which amended Section 939.645, reads, in pertinent part:

SECTION 1. 939.645(1)(b) of the statutes is amended to read:

1. 939.645(1)(b) Intentionally selects the person against whom the crime under par.(a) is committed or selects the property *that* is damaged or otherwise affected by the crime under par.(a) *in whole or in part* because of *the actor's belief or perception regarding* the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct.*

The relationship of this amendment to the original statute has never been determined by a Wisconsin court. The significance of this amendment will be discussed more fully in connection with Mitchell's vagueness challenge at Part VII, *infra*.

sole, primary, or "but-for" cause of the defendant's selection of the victim, application of Section 939.645 does not serve any of the State's asserted interests. In fact, the only interest that is served is the State's interest in punishing bigotry itself. This interest is not legitimate.

The hate crime law is further overinclusive because there will be situations in which the defendant did select the victim solely out of bias, but the extra harm the State wishes to redress does not occur. For example, a hate crime may occur without the bigoted motives being communicated to the victim or anyone else. Or, the victim may be aware of the defendant's motive but not be affected by it. In neither case have the extra harms postulated by the State occurred, but the statute still applies.[10] The hate crime law's use of motive as a per se surrogate for the effects the State seeks to redress creates an impermissible and incorrect presumption that those effects will occur every time an offender is motivated, even in minor part, by bias.

The statute is also underinclusive. In some cases, the victim is not selected because of status, but the same effects are created. For example, *A* vandalizes *B*'s house, not knowing or not caring that *B* is one of the few Jews in the neighborhood; however, *B* and others mistakenly believe that the house was vandalized by anti-Semites. In other cases, a bias motive may be present that is not one of the biases proscribed by the statute. The murderers of civil rights activists James Chaney, Andrew Goodman, and Michael Schwermer selected them "because of" their political views and activism, not their races or religions. Likewise, a white pro-civil rights legislator or a heterosexual gay rights activist may be victimized because of their activities. Although these crimes are just as likely to create exactly the effects the State seeks to address, Section 939.645 would not apply.

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[10] In the present case, there has been no showing that Mr. Mitchell's motives caused any additional harm to Mr. Reddick beyond that attributable to the battery, or to anyone else. Had Section 939.645 not been invoked, perhaps neither Mr. Reddick nor anyone else even would have been aware of Mr. Mitchell's motives.

Although underinclusiveness does not automatically render a statute unconstitutional, where, as with Section 939.645, the underinclusiveness is based on content and viewpoint, the particular distinctions drawn must satisfy strict scrutiny. In *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975), this Court stated that it "frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression." *Id.* 215 (citation omitted). Indeed, "the facial underinclusiveness of [a statute] raises serious doubts about whether [the state] is, in fact, serving, with this statute, the significant interests which [the State] invokes." *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). *See also F.C.C. v. League of Women Voters*, 468 U.S. 364, 396 (1984). The State's inclusion of some bases for victim selection, and not others (such as gender, activism, politics, and poverty) that create the same type of harm, raises those serious doubts.

The State has not offered any justification for its selection of subjects. They are not, for example, the traditional "suspect classifications" of equal protection analysis, nor does the State offer any statistical evidence to support an assumption that more or worse crimes are committed in Wisconsin "because of" disability or national origin than "because of" gender or abortion. Rather, the underinclusiveness suggests that the subjects listed in the statute are simply those biases of which the State wishes to express its disapproval.

Section 939.645 is not narrowly tailored and cannot satisfy constitutional standards. Where a motive included in the statutory list exists, the defendant is subject to enhanced penalties, even if there is no harm in addition to that caused by the underlying offense. However, when the motive is a bias not singled out by the State, there can be no enhancement, even if there is substantial additional harm. This irrational result is easily avoided with a neutral enhancement statute, under which punishment would be commensurate with actual harm.

III. SECTION 939.645 IS SUBSTANTIALLY OVERBROAD IN THAT IT ENHANCES PENALTIES FOR "FIGHTING WORDS" AND OTHER PUNISHABLE EXPRESSION ON A CONTENT- AND VIEWPOINT-SPECIFIC BASIS.

In judging whether a statute is overbroad, "[t]he crucial question. . . . is whether the [law] sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. Rockford*, 408 U.S. 104, 114-115 (1972). This Court held in *R.A.V.* that even constitutionally unprotected speech may not be punished by laws which make distinctions on the basis of content and viewpoint. Section 939.645 applies to a substantial number of statutes which punish "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and other punishable expression.[11] Application of the hate crime law to speech offenses results in more severe punishment of those offenses based on bigoted content. Because the statute makes a content-based distinction that is impermissible under *R.A.V.*, it is overbroad.

Moreover, this overbreadth is substantial within the meaning of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In *Broadrick*, this Court observed that its past precedents had relaxed the traditional rules of standing "to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " 413 U.S. at 612 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). This Court has noted that the consequence of this departure from traditional rules of standing is "strong medicine" which, when invoked, requires that the overbroad statute not be enforced, and the wrongdoer escape all punishment.

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[11] In fact, Todd Mitchell's actions in the present case are accurately characterized as fighting words. He was not convicted of battery, but of "battery, party to the crime," and solely on the basis of his words that incited others to a breach of the peace, i.e., fighting words. Thus, even if there could be other constitutional applications of Section 939.645, it would still be unconstitutional as applied to Mr. Mitchell.

Some of the State's amici tacitly concede the overbreadth of the hate crime law, but argue that its overbreadth is not substantial because its unconstitutional applications are "limited" and "marginal." *See, e.g.*, Brief of Criminal Justice Legal Foundation at 23-24. On the contrary, the Wisconsin Criminal Code contains numerous speech offenses to which the enhancer applies. *See, e.g.*, §§ 942.01, Defamation; 942.03, Giving False Information for Publication; 943.30, Threats to Injure or Accuse of Crime; 943.31, Threats to Communicate Derogatory Information; 944.20, Lewd and Lascivious Behavior; 944.21, Obscene Material or Performance; 944.23, Making Lewd, Obscene or Indecent Drawings; 946.31, Perjury; 946.32, False Swearing; 946.46, Encouraging Violation of Probation or Parole; 946.64, Communicating with Jurors; 947.01, Disorderly Conduct; 947.013, Harassment. These speech offenses represent quite a large proportion of the Wisconsin criminal statutes to which Section 939.645 would ever be applied.

The Wisconsin Supreme Court has construed Section 947.01, the disorderly conduct statute, to apply to fighting words. *State v. Zwicker*, 164 N.W.2d 512 (Wis. 1969). "Fighting words" offenses often include epithets that would trigger application of the hate crime law. An incident of disorderly conduct involving a boisterous protest against Irish Catholics who refuse to let gays march in a St. Patrick's Day parade may become a "hate crime" if someone utters "fighting words" about Catholicism, heterosexuals, or the Irish (but not the I.R.A.). A malicious slander against a public official is converted from a misdemeanor to a felony "hate crime" if its content evidences one of the outlawed viewpoints. Even if Section 939.645 applied only to crimes involving serious bodily injury, it would be unconstitutional for all of the reasons already discussed. Because it also applies to speech crimes, it is unconstitutional for the additional reason that it is substantially overbroad.

Section 939.645 will inhibit political expression. When minority communities feel victimized by landlords or by retail establishments, disputes will tend to arise across racial or ethnic lines reflecting the differing economic status of the

groups involved. A threat to communicate derogatory information (Wis. Stat. § 943.31) or to injure a business (Wis. Stat. § 943.30), both felonies in Wisconsin, is likely to be interpreted as ethnically or racially motivated. Actions like these are often perceived by the most economically deprived minorities as their only effective response to injustice. Such actions are the very essence of political protest, but Section 939.645 would treat them as hate crimes. The result is punishment of political thought that reflects the legitimate frustrations felt by disadvantaged groups.

The "substantiality" requirement of *Broadrick* ought not even to apply to content-and viewpoint-specific statutes like Section 939.645. In *Broadrick*, the Court repeatedly cautioned that the law challenged there was not "directed at particular groups or viewpoints," and that it "regulat[ed] political activity in an even-handed and neutral manner." *Id.* at 606, 616. Wisconsin's hate crime law is not neutral and evenhanded; it discriminates on the basis of content and viewpoint.

Broadrick was a judicial reaction to the overbreadth doctrine's "strong medicine" which prohibited all punishment of a wrongdoer whenever the doctrine applied. A determination that Section 939.645 is overbroad does not require that Todd Mitchell's wrongdoing go unpunished. Todd Mitchell was properly convicted and incarcerated on the underlying charge brought against him. Invalidation of the hate crime law as overbroad does not reverse his conviction or totally abate his punishment.

The overbreadth doctrine provides "breathing space" for First Amendment freedoms. *N.A.A.C.P. v. Button*, 371 U.S. 432, 433 (1963). Ideas, thoughts, opinions, and biases are the genesis of all speech. The "strong medicine" of overbreadth which is prescribed for the protection of pure speech is administered too late unless it also protects the ideas, thoughts, opinions, and biases which precede all speech. In this context, where the overbreadth doctrine does not shield the wrongdoer from punishment for his acts, its application is appropriate to preserve this Court's historic commitment to free political discourse.

IV. SECTION 939.645 IS IMPERMISSIBLY DEPENDENT UPON THE DEFENDANT'S FIRST AMENDMENT ACTIVITY FOR PROOF OF MOTIVE, AND CHILLS OTHERS' EXPRESSION AND ASSOCIATION PROTECTED BY THE FIRST AMENDMENT.

The First Amendment does not prevent the government from considering a defendant's words, associations, and books when relevant to neutral elements of offenses or sentencing factors. On its face, Section 939.645 does not require evidence of the defendant's words, but in practice its enforcement must inevitably, and probably exclusively, rely upon the defendant's speech and associations for evidence of the motive it seeks to punish. Indeed, it is difficult to imagine what other evidence there could be.[12] As a result, the statute threatens to punish the speech and associations themselves. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 359-60 (1991) [hereinafter, *Sticks and Stones*].

This "evidence as element" problem arose in *Street v. New York*, 394 U.S. 576, 588-90 (1969). The defendant burned a flag on a street corner and said, "We don't need no

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[12] Wisconsin has cited to no case, in any jurisdiction, in which the government, in a prosecution under a law analogous to Section 939.645, relied upon any evidence of motive other than the defendant's speech or associations. *See State v. Wyant*; *State v. Stalder*, No. 91-018929 C.S. 10A (Broward Cty., Fla., Apr. 20, 1992), *jurisdiction accepted*, No. 79, 924 (Fla., June 10, 1992); *State v. Plowman*; *State v. Beebe*, 680 P. 2d 11 (Or. App. 1984); *People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988); *State v. LaDue*, No. 4088-8-90 CM. Cr. (Chittenden Cty., Vt. Apr. 18, 1991), *appeal docketed*, No. 91-313 (Vt. Aug. 5, 1991). It is also worth noting that virtually the only way to defend against a hate crime charge is to offer evidence of "good" speech and associations. In this case Mr. Mitchell's trial attorney felt compelled to present evidence that Mitchell did not express animosity toward whites and had a white girlfriend. (R. 65: 193). In order to counter prosecution testimony of gang associations, Mr. Mitchell was required to present evidence that he did not associate with "undesirable elements."

damn flag." This Court struck down the portion of the challenged statute that prohibited publicly defying or casting contempt upon the American flag by words. Although a "public mutilation" provision survived, this Court refused to uphold the defendant's conviction under that provision because it found it impossible to say that his "words were not an independent cause of his conviction." *Id.* at 589. The defendant could not be punished where his conviction "may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." *Id.* at 594.

Similarly, in *Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir. 1974), the court held that a police officer's dismissal for an "unsatisfactory attitude" that was evidenced solely by protected expression violated the First Amendment.

> The words appellant spoke were the only indicia of his attitude, and the attitude was inseparably intertwined with the content of the statements. . . . And it is clear beyond peradventure that but for the remarks. . . . appellant would not have been dismissed from the police force. The first amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker is penalized not for his speech but for a state of mind manifested thereby.

Id. at 845.

Not only does Section 939.645 punish the defendant's speech, thought, and associations, it impermissibly chills others' exercise of these rights. The Wisconsin Supreme Court correctly noted that the chilling effect of Section 939.645 "goes further than merely deterring an individual from uttering a racial epithet during a battery." 485 N.W.2d at 816. The court observed:

> All of [a defendant's] remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of everything from ethnic jokes to serious intellectual inquiry.

Id. at 816 (quoting Gellman, *Sticks and Stones*, *supra*, at 360) (second alteration in original).

Unfortunately, this is no idle speculation on the Wisconsin court's part. In one case, a court found that an officer had probable cause to arrest a suspect for violating a similar law where the officer "had heard through his brother-in-law that [the arrestee] had a history of making racial insults." *Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991).

Moreover, epithets and slurs are not the only speech chilled by the statute. A person sincerely wondering about subjects such as intermarriage, AIDS, genetic diseases, or integration may well refrain from airing any "politically incorrect" thoughts, knowing that someday they could be examined by the government and introduced as damning evidence in court.

The inherent subjectivity of judgments about defendants' motives also creates "an obvious invitation to discriminatory enforcement." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). An especially pernicious danger is the likelihood of disproportionate application of the statute against minorities, particularly young males. In Florida, African-Americans have been arrested on several occasions for violating an analogous law by calling police officers "white crackers." *See, e.g., Hate-Crime Charge Dropped Against Black Man in Florida*, N.Y. Times, Aug. 31, 1991, at 10, col. 6. The FBI's recently released data (*see* note 6, *supra*) indicate that 30% of the offenders whose race was reported were African-American. FBI Preliminary Report at 2. Studies of hate speech laws in other countries have found grossly disproportionate application against minorities and limited efficacy at best. Sandra Coliver, *Hate Speech Laws: Do They Work? in Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* 363, 363-73 (Sandra Coliver et al., eds., 1992).

The chilling effect of Section 939.645 will lead to a result the State denies it seeks: the de facto illegality of the expression of bigoted thought. As the general public becomes aware of convictions under the statute based solely on defendants' words and associations, people will begin to think of

expressions of bigotry not simply as socially unacceptable, but as "illegal." This effect is not a legitimate state interest.

V. SECTION 939.645 IS NOT ANALOGOUS TO EXISTING ANTI-DISCRIMINATION LAWS.

In its brief, the State relabels Section 939.645 a "discrimination crime" instead of a "hate crime."[13] The State seeks to repackage the subject by associating "hate crime" laws with our nation's historic efforts to eradicate discrimination against minorities. Ironically, hate crime laws are frequently, as here, used against minorities.

The State's suggestion that if Section 939.645 is unconstitutional then federal and state anti-discrimination laws must also be unconstitutional is incorrect. First, the anti-discrimination laws are not before this Court in the present case. Second, neither the Wisconsin Supreme Court's decision nor this Court's decision in *R.A.V.* provides a basis for a challenge to those laws.

The Wisconsin Supreme Court specifically distinguished the anti-discrimination laws: "Discrimination and bigotry are not the same thing. Under anti-discrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the 'selection' which is punished is not an act, it is a mental process." *Mitchell*, 485 N.W.2d at 816 (J.A. 46). In *Wyant*, too, the Ohio Supreme Court noted that "laws against discrimination do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive." 597 N.E.2d at 456.

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[13] Elsewhere in its brief before this Court, the State admits that it is "obvious, that the Wisconsin Legislature was motivated by a 'desire to suppress hate crimes.' " Brf. Pet. at 23 (quoting *Mitchell*, 485 N.W.2d at 817); (J.A. 48). The State's recharacterization of Section 939.645 as punishing "discrimination crimes," not "hate crimes" as it described them in the Wisconsin court below, is not only a shift in its argument, it is inaccurate.

Under federal laws against employment discrimination, a case can be made under the "disparate impact" test, which requires no showing of any motive. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). The disparate impact test is not used to raise an inference of motive; rather, it recognizes that employment discrimination is equally possible *without* a motive. The *Wyant* court noted that even under the disparate treatment test, "[i]t is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*. ' . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' " 597 N.E.2d at 456 (quoting *Griggs* at 432). Wisconsin is thus incorrect in its assertion that "the presence of discriminatory motive *alone* affects the sanction imposed on conduct." Brf. Pet. at 31.

The Wisconsin Supreme Court also stressed the difference between the civil remedies provided by anti-discrimination laws and the criminal sanctions imposed by Section 939.645. Certainly, the difference between civil sanctions and loss of liberty is significant, and statutes imposing the latter must be very carefully written and evaluated.

The State also attempts to analogize Section 939.645 to the imposition of punitive damages under 42 U.S.C. Sections 1981 and 1983. These statutes prohibit interference with exercise of equal rights under law for any reason; neither has any "because of" language or any other motive requirement. In addition, Section 1983 requires action under color of state law. *West v. Adkins*, 487 U.S. 40 (1988).

Moreover, even if these civil anti-discrimination laws did turn on motive in the same way as does Section 939.645, they would not be unconstitutional. Unlike Section 939.645, they are narrowly drawn to infringe upon First Amendment rights only insofar as necessary to serve the governmental interests for which they were enacted. In a Title VII case, for example, to the extent that certain motives are implicated in disparate treatment cases, they are so inextricably intertwined with the conduct of the wrongful employment action that there is no

way to sever the regulation of motive from the regulation of conduct.

In Section 939.645, the punishment of the motive is readily severable from the punishment of the conduct. The statute even requires a special verdict. The State can easily reach the conduct without reaching the motive; indeed, it has been doing so for as long as it has had a criminal code. Even without Section 939.645, all the targeted conduct is still punishable. By contrast, elimination of the anti-discrimination laws would leave discrimination victims without any remedy at all.

Nor is there any neutral alternative that would serve the government's compelling interest in equal opportunity that underlies Title VII and other civil anti-discrimination statutes. For example, a statute prohibiting employers from firing employees for *any* reason or requiring employers to make all hiring and promotion decisions by random lot would be content-neutral but clearly irrational. This would not be a viable alternative, nor would a statute that required restaurant owners to serve all customers or that required landlords to rent to all applicants.

The federal criminal statutes dealing with civil rights are no more analogous to Section 939.645. 18 U.S.C. Sections 242 and 243 include the phrases "by reason of his color" and "on account of race," but they each require action under color of state law. 18 U.S.C. Section 245(b)(2) applies to private actors, but only to interference with "federally protected activities" such as attending public school, jury service, applying for employment, participating in government programs, traveling in interstate commerce, or using public accommodations. 18 U.S.C. Section 3631 in effect adds interference with federally protected housing rights to this list.

All of these criminal statutes are examples of the federal government's exercise of its power under the Fourteenth Amendment to guarantee citizens specific federally protected rights. Section 939.645 does not protect any constitutional or federal statutory rights. Not all crimes against a person violate his or her constitutional rights, even when committed by government officials. *Screws v. United States*, 325 U.S. 91,

108-09 (1945). Similarly, Section 1985(3) prohibits conspiracies that have the specific purpose of interfering with others' exercise of certain rights. Section 939.645, by contrast, has no requirement that the offender had a purpose to create any particular interference or other result.

Moreover, both civil and criminal anti-discrimination laws, which are corrective of inequality of opportunity in public spheres of activity, differ fundamentally from laws such as Section 939.645.[14] The federal civil anti-discrimination laws prohibit denial of equal access to opportunities offered to the public, by one acting in a public or commercial arena.[15] Thus, an employer is forbidden to refuse to hire an employee on the basis of the employee's religion, but the employee may refuse to work for an employer on the basis of the employer's religion, even though both acts contribute to workplace imbalance. Restaurant owners and landlords, who hold their establishments open to the public generally, may not turn away diners or tenants based on race, but diners and tenants cannot be forced to choose restaurants or apartments without regard to race. Furthermore, a restaurant owner can constitutionally be compelled to serve Jews in his restaurant, but not in his own home. Some of the federal anti-discrimination laws do not apply unless a minimum number of employees or housing units, for example, are involved. *See*

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[14] Amicus ADL, in contradiction to its position in this Court, has elsewhere expressly distinguished discrimination claims from reportable "bias incidents." According to the ADL, employment discrimination "involves a very different kind of anti-Semitic problem – no less serious to the alleged victim, to be sure, but simply distinct from the openly anti-Jewish acts of hostility under consideration here." ADL 1992 Audit at 24-25.

[15] The words "public" and "private" are sometimes used to refer to governmental and nongovernmental action, respectively. As used in this discussion, "public" refers not to governmental action, but to actions taken with respect to the public at large or in a public or commercial sphere of action, as in "public accommodation."

e.g. 42 U.S.C. Sections 2000a (b)(1) (public accommodations); 3604 (B)(2) (fair housing); 2000e (b) (employment discrimination).

The State's relabeling of hate crimes as "discrimination crimes" is conclusory and circular. As a legal term, "discrimination" means *illegal* selection of persons based on some characteristic. Calling a selection "discrimination" evades the whole analysis. It is a bootstrap argument. It is as if the State wanted to punish assisted suicide and justified its position by calling the new offense "assisting in a self-homicide," then arguing its constitutionality by saying that all "homicide" is punishable. The flaw in this logic is that by calling it "self-homicide" instead of "suicide," the State has begun where it is trying to end up. Not all killings are illegal. When they are, we call them "homicide." That is the difference between the two terms. The same is true of "selection" and "discrimination." Not all selections on the basis of race, etc., are illegal. When they are not, they are not "discrimination."

When a race-based decision is made by a private actor, the law simply does not recognize it as "discrimination." This Court has on several occasions reviewed laws limiting the rights of clubs and associations to exclude persons "because of" race or sex. In each case, the pivotal question was whether the organization was "public" or "private." *See, e.g., New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In making that determination, this Court looks to indicia such as the commercial nature of the activity, the size of the group involved, and whether services were made available to the public generally. Unlike a public actor, a private individual is not denying certain people an equal chance to avail themselves of opportunities held out to the public generally. Wisconsin would not assert that the purpose of Section 939.645 is to ensure "equal opportunity crime."

In *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764 (1993), this Court stressed that most elements of "general rights are obviously not protected against private

infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth.)" *Id.* at 764. Few rights are protected against private encroachment. *Id.* Justice Souter discussed at length "the constitutional limits of congressional power to regulate purely private action," explaining that the prevention clause of Section 1985(3) prohibits only those private actions that "would, in real terms, be the exercise of state power itself. To the degree that private conspirators would arrogate the State's police power to themselves to thwart equal protection . . . their action would be tantamount to state action," *id.* at 776 (Souter, J., concurring in the judgment and dissenting in part); therefore, government may prohibit those actions.

The State, relying on Justice Bablitch's dissenting opinion below, suggests that because the "intentional selection" of persons "because of" race, etc., can be prohibited to those engaged in legal activities such as housing or employment, *a fortiori*, it can be prohibited to those engaged in illegal activities. This argument has visceral appeal, but it rests on an incorrect premise: that status-based selection in all types of legal activity is prohibitable. The intentional selection of spouses, roommates, authors, or golf partners "because of" race surely does not constitute regulable "discrimination."[16] All of the civil rights laws cited by Wisconsin deal with persons or entities acting within a public or commercial arena, or acting with the specific purpose to interfere with others' exercise of certain constitutional rights, duties, or entitlements; Section 939.645 does not.

There is irony in the State's heavy reliance upon the anti-discrimination laws to justify the punishment of bigoted viewpoints. Anti-discrimination laws are themselves the product of freedom of thought on sensitive issues of race and ethnicity. We would not have those laws today had not the First

[16] In fact, Justice Bablitch's opinion does not compare the motives punished by Section 939.645 to "intentional selection" in all private activity; rather, it makes repeated references to "discrimination *in the marketplace*." 485 N.W.2d at 820 (Bablitch, J., dissenting) (emphasis added).

Amendment protected the freedom of civil rights activists to hold and to act upon unpopular and government-disapproved beliefs on matters of race.

VI. SECTION 939.645 DISCRIMINATES AMONG OFFENDERS BASED SOLELY UPON THE EXERCISE OF THEIR FUNDAMENTAL RIGHTS OF THOUGHT AND EXPRESSION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A law that treats people differently based on their exercise of First Amendment rights is "presumptively invidious" and must undergo strict scrutiny to ascertain whether it is "precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). People who commit the same predicate offenses are treated differently under Section 939.645 based on the viewpoints they hold and express. One who commits an offense because of some "acceptable" motive is subject to far less severe punishment than one who acts out of ethnic bias.[17]

Wisconsin argues that it can only serve its interests, discussed above, through the enhanced punishment of crimes motivated by ethnic animosity. However, Wisconsin confuses its legitimate interest in punishing violent or destructive acts with regulating hatred and bigotry among individuals. Clearly, controlling violence is within Wisconsin's police

[17] Wisconsin notes that Mr. Mitchell's equal protection challenge to Section 939.645 was found waived by the Wisconsin Court of Appeals. Brf. Pet. at 6-7. The Wisconsin Supreme Court reserved ruling on the equal protection claim. *Mitchell*, 485 N.W.2d at 809 n.2.; (J.A. 28 n.2). In any case, Wisconsin has raised the equal protection issue in its brief before this Court, arguing that "[g]overnments may treat two otherwise identical actors differently if the conduct of one actor was motivated by a desire to discriminate against the race, color, ethnicity or other status of the victim." Brf. Pet. at 7. The equal protection violation inherent in Section 939.645 provides an independent basis for the statute's unconstitutionality, a question reserved by the Wisconsin Supreme Court.

power, but just as clearly, the First Amendment bars Wisconsin from penalizing the thoughts motivating the offender, however despicable the majority may find them. *R.A.V.*, 112 S. Ct. at 2550. *Cf. Police Dept. v. Mosley*, 408 U.S. 92, 96 (1972) (overturning viewpoint-based picketing ordinance on equal protection grounds; "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

That defendants may have violated other criminal laws "because of" their beliefs does not deprive those beliefs of constitutional protection as a fundamental right. If that were the case, then the State of Texas, whose flag desecration statute was held unconstitutional in *Texas v. Johnson*, could have achieved its end by the simple expedient of prohibiting public burning (a legitimate exercise of its police power), and then enhancing the penalty for any person who violated the public burning statute "because of" opposition to the government. Legislatures could enhance penalties for trespass or arson for those who committed them "because of" opposition to abortion or "because of" environmental concerns. Such schemes obviously would fail under strict scrutiny.

So must Section 939.645. Even assuming the validity of Wisconsin's asserted interests, the statute is not "precisely tailored" to serve them. It reaches thought and expression protected by the First Amendment, both by punishing it directly and through its chilling effect. At the same time, although the statute is ostensibly intended to prevent and redress the particular harms assertedly caused by bias motives, it ignores those particular harms when they are created by biases other than those particularly disapproved of by the government. The statute thus does at once both too much and too little and cannot be considered "precisely tailored."

Finally, there is a variety of neutral approaches that would not distinguish among defendants on the basis of their exercise of their thought and belief and that would serve the State's interests at least as well as does Section 939.645. In

the equal protection analysis, as in the First Amendment analysis, the existence of adequate neutral alternatives confirms the unconstitutionality of the statute.

The extra punishment of those who engage in prohibited conduct because they harbor bigoted thoughts as compared to those who do so for "state approved" reasons is an impermissible denial of equal protection. It treats similarly situated people differently based upon their exercise of their fundamental rights of thought and expression, and is not precisely tailored to serve a compelling state interest. For this reason as well, Section 939.645 is facially unconstitutional.

VII. SECTION 939.645 IS UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE IT GIVES INADEQUATE NOTICE OF THE PROHIBITED ACTIVITY AND INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT.[18]

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court explained that vague statutes offend the Due Process Clause because they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; because they fail to give sufficiently "explicit instructions" to avoid "arbitrary and discriminatory enforcement"; and because they inhibit the exercise of First Amendment freedoms. *Id.* at 108-09. The vagueness of Section 939.645 creates all three of these problems.[19]

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[18] The Wisconsin Supreme Court reserved ruling on Mr. Mitchell's vagueness claim. 485 N.W.2d at 809 n.2; (J.A. 28 n.2). The reservation of this issue, in addition to Mr. Mitchell's equal protection challenge, counsels that even if this Court declines to affirm, it should return the case to the Wisconsin Supreme Court rather than reversing the judgment below.

[19] The third *Grayned* "vagueness" concern is the chill of protected activity. Vague laws often create that chill, which is discussed in Part IV, *supra*.

As an initial matter, this Court should note that Section 939.645 was amended just one month prior to the Wisconsin Supreme Court's decision in the present case. 1991 Wis. Act 291 (effective May 13, 1992) (*see* note 9, *supra*). The constitutionality of the pre-amendment statute is before this Court in the present case. One feature of the amendment was to add the words "in whole or in part" before the words "because of." The Wisconsin Supreme Court, having reserved ruling on the vagueness challenge, did not discuss the effect of the amendment upon the interpretation of the pre-amendment Section 939.645 in the present case. That effect is far from clear, and it is critical.

The amendment either clarified the meaning of Section 939.645 or expanded it. If the amendment was a clarification, then pre-amendment Section 939.645 included all mixed motive situations, even those in which the bias motive was only a negligible factor. Moreover, the legislature's having felt the need for a clarifying amendment highlights the inherent ambiguity of the pre-amendment statute. If, on the other hand, the amendment expanded the statute, then there is still no guidance as to the scope of pre-amendment Section 939.645 in mixed motive situations. Furthermore, that would render pre-amendment Section 939.645 a defunct law.

No Wisconsin court has interpreted the scope of the phrase "because of" in pre-amendment Section 939.645, the phrase the Wisconsin Supreme Court considered the critical operative language. It was not necessary for the Wisconsin Supreme Court to do so, because the scope of the statute is irrelevant to its holding that the statute creates a thought crime. In order to determine the constitutionality of the pre-amendment Section 939.645, however, that construction is necessary, and properly ought to be done by Wisconsin's courts.[20] The ambiguity of Section 939.645 in mixed motive

[20] It may be argued that the facts of the present case could support a reasonable conclusion that Mr. Mitchell was solely motivated by race. However, a reasonable trier of fact could have found that he was motivated only partly by race. The jury was never instructed as to what proportion of his motive had to be related to race. The trial court said only that the State was required to establish that Mr. Mitchell committed the crime "for the reason that" Mr. Reddick was white. (J.A. 11-12). Therefore, it is impossible to determine what proportion of Mr. Mitchell's motive Mr. Reddick's race was. In all likelihood, the jury, not having been instructed to so so, never considered the question.

Where there is ambiguity in criminal statutes, due process requires that they be construed strictly in favor of the defendant. *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). If the Wisconsin Supreme Court had construed Section 939.645, and done so strictly in favor of Mr. Mitchell, so that sole motivation were required, it would have been forced to vacate his conviction on the ground that there was no showing that the jury found that he was solely motivated by Mr. Reddick's race, even if facts supporting that conclusion were presented. *See McCormick v. United States*, 111 S. Ct. 1807, 1814-15 and n.8 (1991); *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946).

situations is a serious flaw. Mixed motive cases are likely to be far more common than pure motive situations. *See, e.g., State v. Wyant*; *State v. Stalder*. The statute requires that the defendant selected the victim "because of" the victim's ethnicity, but there is nothing to indicate whether the victim's ethnicity must have been the sole or even the predominant reason. The words "because of" could as easily include a substantial reason, a contributing reason, a minor reason, or even an unconscious reason. Thus, the public is left to speculate whether mixed motive situations are included, and if so, which ones. More dangerous, some prosecutors, courts, and juries might apply the statute to some mixed motive situations to which others would not, inviting arbitrary and even discriminatory application and leading to inconsistent results.

This Court has stated that the most important aspect of the void-for-vagueness doctrine is the second *Grayned* concern, "the requirement that a legislature establish minimal guidelines to govern law enforcement," because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender v. Lawson*, 461 U.S. 352, 358

(1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). The punishment of subjectively offensive motivations central to Section 939.645 creates an "obvious invitation to discriminatory enforcement," *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971), particularly against groups considered dangerous or annoying by local prosecuting officials.

Sadly, this risk is especially severe with respect to minorities. The recent FBI report discloses that members of minority groups are being charged with "hate crimes" under analogous statutes in numbers far in excess of their proportion to the population. Predominantly white police, prosecutors, juries, and judges may be more likely to view an African-American's actions as having been racially motivated than they would a white defendant's identical actions, based upon what they imagine would make them feel conscious of race in the victim's place.

The amendment may have been intended to expand the scope of Section 939.645 in mixed motive situations. More likely, this problem had not been considered at the time of the statute's original enactment, and the amendment was intended to provide a standard where none had previously existed. In either case, the implication is the same: there is simply no way to know how, if at all, pre-amendment Section 939.645 applies to mixed motive situations. Both the public, who must obey the law, and police, prosecutors, and courts, who must enforce and apply it, are left without any guidance. Moreover, such a substantial change in the law renders the statute before this Court, pre-amendment Section 939.645, a dead letter, and there is no point to this Court's reviewing its constitutionality.

CONCLUSION

Wisconsin surely had the finest of intentions in enacting Section 939.645. People of good will everywhere share Wisconsin's vision of an America free from the curses of bigotry, hate, and violence. It is easy to understand the temptation to give in to feelings of fear and helplessness at the cost of liberty, to see a mirage of an objective approach to legitimate ends where there is in reality only a well-intentioned evasion

of the First Amendment. However, the decisions of this Court throughout the years have taught that an incursion into First Amendment freedom is no less prohibited when employed in the name of good than when employed in the name of evil. Permitting the former invites the latter.

One generation's faith in its own good intentions and judgment must not blind it to the reality that the license it grants to itself today will someday be inherited by others, perhaps less committed to the ideals of brotherhood and tolerance. Had a law like Section 939.645 been in force in Alabama in 1964, when Dr. Martin Luther King, Jr. held a civil rights demonstration without complying with a permit law, he could have been subject to drastically greater penalties.

If Wisconsin's ultimate goal is not just to redress the criminal fruits of intolerance, but to eliminate intolerance altogether, its best hope lies outside of laws like Section 939.645. Wisconsin will not cure bigotry by punishing it, nor teach tolerance by being intolerant. Locking up or silencing the bigots among us will bring only the illusion of mutual acceptance and respect, and reliance upon illusions is dangerous.

Fortunately, government need not choose between punishing thought of which it disapproves on the one hand, and standing silently by while people suffer on the other. Wisconsin is free to espouse the ideals of mutual tolerance and even to punish those who, in rejecting those ideals, hurt others. It

must simply do so in a way that is as faithful to our commitment to liberty as it is to our aspirations to equality. That way is clear.

Respectfully submitted,

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18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

(As amended Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7019, 102 Stat. 4396.)

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18 U.S.C. § 243. Exclusion of jurors on account of race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any

citizen for such cause, shall be fined not more than $5,000.

(June 25, 1948, ch 645, § 1, 62 Stat. 696.)

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42 U.S.C. § 2000a. Prohibition against discrimination or segregation in places of public accommodation

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title [42 USC §§ 2000a-2000a-6] if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

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42 U.S.C. § 2000e. Definitions

For the purposes of this title [42 USC §§ 2000e et seq.] –

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USC § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

SENTENCING GUIDELINES

§ 3A1.1 Vulnerable Victim

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was

otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Wis. Stat. § 942.01 Defamation. (1) Whoever with intent to defame communicates any defamatory matter to a third person without the consent of the person defamed is guilty of a Class A misdemeanor.

(2) Defamatory matter is anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in his business or occupation.

(3) This section does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends or if the communication was otherwise privileged.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of 2 other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty or no contest.

Wis. Stat. § 942.03 Giving false information for publication. Whoever, with intent that it be published and that in injure any person, and with knowledge that it is false, communicates to a newspaper, magazine, or other publication any false statement concerning any person or

any false and unauthorized advertisement is guilty of a Class A misdemeanor.

Wis. Stat. § 943.30 Threats to injure or accuse of crime. (1) Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime of offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class D felony.

(2) Whoever violates sub. (1) by obstructing, delaying or affecting commerce or business or the movement of any article or commodity in commerce or business is guilty of a Class D felony.

(3) Whoever violates sub. (1) by attempting to influence any petit or grand juror, in the performance of his or her functions as such, is guilty of a Class D felony.

(4) Whoever violates sub. (1) by attempting to influence the official action of any public officer is guilty of a Class D felony.

Wis. Stat. § 943.31 Threats to communicate derogatory information.

Whoever threatens to communicate to anyone information, whether true of false, which would injure the reputation of the threatened person or another unless the threatened person transfers property to a person known not to be entitled to it is guilty of a Class E felony.

Wis. Stat. § 944.20 Lewd and lascivious behavior. Whoever does any of the following is guilty of a Class A misdemeanor:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes genitals or pubic area.

Wis. Stat. § 944.21 Obscene material or performance. (1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall

be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section;

(a) "Community" means this state.

(b) "Internal revenue code" has the meaning specified in s. 71.01 (6).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. the average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in patently offensive way; and

3. Lacks serious literary, artistic, political, education or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole:

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus, or lewd exhibition of human genitals.

(f) "Wholeslae transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

(3) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, or transfers any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5)(a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

(c) If the person violating sub. (3) or (4) has 2 or more prior conviction under this section, the person is guilty of a Class D felony.

(d) Prior convictions under pars. (b) and (c) apply only to offenses occurring on or after June 17, 1988.

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class D felony.

(5m) A contract printer or employe or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25 (3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney

general determines under s. 165.25 (3m) that the proceeding may be commenced.

(8)(a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employe, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in s. 115.001 (3r).

3. Any school offering vocational, technical, or adult education that:

a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under s.38.51 or is a school described in s. 38.51(9)(f), (g) or (h); and

b. Is exempt from taxation under section 501 (c)(3) of the internal revenue code.

4. Any institution of higher education that is accredited, as described in s. 39.30 (l)(d), and is exempt from taxation under section 501(c)(3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2)(c) 1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11).

Wis. Stat. § 944.23 Making lewd, obscene or indecent drawings.

Whoever makes any lewd, obscene or indecent drawing or writing in public or in a public place is guilty of a Class C misdemeanor.

Wis. Stat. § 946.31 Perjury. (1) Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any manner, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class D felony:

(a) A court;

(b) A magistrate;

(c) A judge, referee or court commissioner;

(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;

(e) A notary public while taking testimony for use in an action or proceeding pending in court;

(f) An officer authorized to conduct inquests of the dead;

(g) A grand jury;

(h) A legislative body or committee.

(2) It is not a defense to a prosecution under this section that the perjured testimony was corrected or retracted.

Wis. Stat. § 946.32 False swearing. (1) Whoever does either of the following is guilty of a Class D felony:

(a) Under oath or affirmation makes or subscribes a false statement which he does not believe is true, when such oath or affirmation is authorized or required by law or is required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action.

(b) Makes or subscribes 2 inconsistent statements under oath or affirmation in regard to any matter respecting which an oath or affirmation is, in each case, authorized or required by law or required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action, under circumstances which demonstrate that the witness or subscriber knew at least one of the statements to be false when made. The period of limitations within which prosecution may be commenced runs from the time of the first statement.

(2) Whoever under oath or affirmation makes or subscribes a false statement which the person does not believe is true is guilty of a Class A misdemeanor.

Wis. Stat. § 946.46 Encouraging violation of probation or parole.

Whoever intentionally aids or encourages a parolee or probationer or any person committed to the department of corrections or the department of health and social services by reason of crime or delinquency to abscond or violate a term or condition of parole or probation is guilty of a Class A misdemeanor.

Wis. Stat. § 946.64 Communicating with jurors. Whoever, with intent to influence any person, summoned or serving as a juror, in relation to any matter

which is before that person or which may be brought before that person, communicates with him or her otherwise than in the regular course of proceedings in the trial or hearing of that matter is guilty of a Class E felony.

Wis. Stat. § 947.01 Disorderly conduct. Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

Wis. Stat. § 947.013 Harassment. (1) In this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

(b) "Credible threat" means a threat made with the intent and apparent ability to carry out the threat.

(1m) Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:

(a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

(1r) Whoever violates sub. (1m) under all of the following circumstances is guilty of a Class A misdemeanor:

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

(1t) Whoever violates sub. (1r) is guilty of a Class E felony if the person has a prior conviction under this subsection or sub. (1r) involving the same victim and the present violation occurs within 7 years of the prior conviction.

(2) This section does not prohibit any person from participating in lawful conduct in labor disputes under s. 103.53.

FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 1 1993
OFFICE OF THE CLERK

No. 92-515

In The
Supreme Court of the United States
October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari
To The Supreme Court Of Wisconsin

REPLY BRIEF OF PETITIONER

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Bowers v. Hardwick,
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Roberts v. United States Jaycees,
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Schacht v. United States,
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State v. Carriger,
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State v. Moore,
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Street v. New York,
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United States v. Butler,
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United States v. Dunnigan,
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University of Pennsylvania v. E.E.O.C.,
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STATUTE CITED

Sec. 939.645(2)(b) 10

OTHER AUTHORITIES

Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*,
4 Stan. Law & Policy Rev. (Winter 1992–93) 15

Klanwatch Intelligence Report,
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Associated Press *Study Says Gay Bashing Is Up*,
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Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*,
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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THIS COURT IS NOT BOUND BY THE WISCONSIN SUPREME COURT'S CONCLUSION THAT THE PENALTY ENHANCER PUNISHES THOUGHT BECAUSE THAT CONCLUSION WAS NOT THE RESULT OF THE STATE COURT'S CONSTRUCTION OF THE STATUTE, BUT WAS WHOLLY THE RESULT OF ITS FIRST AMENDMENT ANALYSIS.

Respondent Mitchell contends that the Wisconsin Supreme Court issued a binding construction of a statute when it concluded that the penalty enhancer punishes "motive," a term the state court equated with

pure thought. However, there is a difference between determining the meaning of words and phrases in a statute (i.e. statutory construction) and assessing whether the statute has the effect of violating the First Amendment (i.e. constitutional analysis). Here, the Wisconsin Supreme Court simply looked at the statute, concluded that it had the effect of punishing thought and, therefore, found a First Amendment violation.

The Wisconsin court never hinted that there was an ambiguity in the statute that required clarification before the First Amendment issue could be addressed. And it did not address the meaning of specific words or phrases. Thus, the court did not "construe" the language of the enhancer.[1]

The state court made it clear it was addressing the effect of the law. For example, the court said that while the statute "refers in a literal sense to the intentional 'conduct' of selecting," it need not ignore the "***practical effect*** of the law--punishment of offensive motive or thought" (J.A. at 37, emphasis added). Furthermore, as the State pointed out in footnote 4 of its opening brief, the *Mitchell* majority did not dispute the construction given the statute by dissenting Justice Bablitch when he construed the law in the context of Mitchell's vagueness claim (J.A. at 37 n.11). The majority's only

[1]*See Rundlett v. Oliver*, 607 F.2d 495, 500 (5th Cir. 1979) (state court *construction* of statutes that federal courts defer to "refers to the structure of a statute, what its words mean, and how it operates"). When the Wisconsin Supreme Court construes a statute, it generally does so expressly and relies on rules of statutory construction. *See, e.g., State v. Richer*, Case No. 91-1466-CR (Wis. Sup. Ct. filed March 10, 1993); *State v. Moore*, 481 N.W.2d 633 (Wis. 1992); *State v. Annala*, 484 N.W.2d 138 (Wis. 1992).

disagreement with the dissent involved the effect of the law.

The State's response to the statutory construction argument at the petition stage bears repeating: "It would come as a great surprise to the Wisconsin high court to learn that it issued a narrow decision based on a particular view of [the Wisconsin statute]. Rather, the Wisconsin court intended to strike a fatal blow at the entire concept of penalty enhancement based on proof that the criminal selected his or her victim by reason of the victim's race or other status" (petitioner's reply to brief in opposition to petition at 2).

II. THE WISCONSIN PENALTY ENHANCER IS NOT A "THOUGHT CRIME" BECAUSE CONSIDERING A DEFENDANT'S MOTIVES FOR CRIMINAL CONDUCT IS NOT THE SAME AS PUNISHING A DEFENDANT FOR HOLDING DISFAVORED BELIEFS.

Mitchell argues that even if this Court is not bound by the state court, this Court should itself conclude the enhancer is void on its face because it punishes thought in violation of the First Amendment. He presents two central arguments: 1) that the enhancer punishes thought because it authorizes the punishment of people because they have disfavored "motives" and "[m]otive consists entirely of . . . thoughts and beliefs," and 2) that even if the enhancer does not directly punish thought, it is still impermissible because it singles out people with certain disfavored motives (respondent's brief at 7). Both of these arguments rely on incorrect assumptions about motivation for action.

A. The consideration of motive for criminal action for purposes of assessing crime severity does not amount to punishing offenders because they hold certain beliefs.

Mitchell claims that the enhancer punishes people for their thoughts because it has the sole effect of punishing "motive," a pure thought process. He asserts we know that a thought process is singled out and separately punished because the proper disposition for the criminal *conduct* is entirely dealt with by the underlying criminal law applicable in each case. This argument is also one Mitchell claims distinguishes the enhancer from other anti-discrimination laws (respondent's brief at 37). The problem with this reasoning is evident.

First, there is an obvious difference between: 1) punishing a person because he holds disfavored beliefs, and 2) considering a motive for an executed crime for the purpose of assessing crime severity and relevant characteristics of the offender. Criminal laws and criminal sentencing routinely employ the latter process and there is nothing about the enhancer that suggests it is any different.

Second, in criminal law, as in anti-discrimination law generally, motives do matter. Among many unfair non-job related reasons for firing an employee, we deem discriminatory reasons based on religion or race, for example, to be a greater societal evil. Among the myriad of reasons people commit murder, many states single out pecuniary motives as warranting the death penalty.[2] And if a racist motive for a crime sheds light

[2]Mitchell is wrong when he asserts that capital sentencing schemes like the one in *Jurek v. Texas*, 428 U.S. 262 (1976), do "not turn on motive, but on the objective act of formation of a contract to murder" (respondent's brief at 12-13). The Texas capital sentencing law is not limited to murders involving the formation of a contract to murder. *Beets v. State*, 767 S.W.2d 711, 737 (Tex. Cr. App. 1987), *cert. denied*, 492 U.S. 912, *reh. denied*, 492 U.S. 937 (1989). Furthermore, many state capital sentencing statutes single out financial motives without reference to murder contracts. *See State v. McDonald*, 661 S.W.2d 497 (Mo. banc. 1983) (listing several capital murder statutes). Also, it is notable that courts often speak in terms of "motive" in these cases. *E.g.*, *State v. Carriger*, 692 P.2d 991, 1010 (Ariz. 1984) ("to prove pecuniary gain, the state must show [the murderer's] *motivation* was the expectation of pecuniary gain").

on proper dispositional factors, that motive can supply the reason for a more severe punishment. *See Barclay v. Florida*, 463 U.S. 939, 948-49 (1983).

Simply repeating over and over that motive is punished for its own sake does not make it true. Although people are sometimes said to have motives apart from their actions, the enhancer only deals with motives for executed crimes. When a person acts on a belief, the government's interest is not in regulating the belief, but in regulating the conduct and assessing the nature of the conduct and the culpability of the offender in light of the offender's motives. Motives are not shielded from examination just because they can be characterized as a thought process.

B. This Court should not extend the free speech principles of content and viewpoint neutrality to motives for executed crimes.

Mitchell asserts that this Court's content and viewpoint analysis in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), "logically applies to conduct, even criminal conduct" (respondent's brief at 8). If this Court

agrees with the State that thoughts and viewpoints are not punished, Mitchell's argument boils down to a disparate impact theory: the enhancer is *effectively* content and viewpoint based because, even when applied as the State suggests, it only falls on offenders with "disfavored" motives and views and not on offenders who act on "favored" motives or hold the "favored" views.[3]

The novel proposal that First Amendment free speech doctrine relating to content and viewpoint neutrality should be applied to motives for criminal actions must be rejected. Mitchell has pointed to no case in which these terms were applied to laws that did not regulate expression, either directly or indirectly.

Mitchell believes that *R.A.V.* applies here because, he asserts, it extended content-based and viewpoint-based analysis to "punishable acts" (respondent's brief at 7). He says that whether those punishable acts are "speech or nonspeech is irrelevant" (*id.*). However, the significance of *R.A.V.* in this respect was that it applied content-based and viewpoint-based concepts to

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[3]Any suggestion that the enhancer favors one ideology over another on its face should be quickly rejected. Under Mitchell's theory, the "disfavored" views are intolerance and hatred based on the various statuses listed in the enhancer, while the "favored" views apparently embrace tolerance and intergroup harmony. But the enhancer can readily be applied to offenders who have the "favored" views on these topics. For example, the enhancer applies to a radical tolerance group that singles out a black victim for a crime to raise the visibility of its cause. It also applies to criminals who act with a purely financial motive, such as a landowner who targets minorities for vandalism in order to drive them out of his neighborhood and preserve the value of his real estate holdings. Like anti-discrimination laws generally, liability under the enhancer does not depend on a particular view, but on the act of singling out a victim because of his status.

invalidate a regulation on a category of *speech* many had believed was entirely unprotected. *See R.A.V.*, 112 S. Ct. at 2551-54 (White, J., concurring). This Court did not reach outside the realm of speech to bring "punishable acts" into First Amendment doctrine. Rather, it recognized that "unprotected" speech was speech nonetheless for limited First Amendment purposes.

Mitchell reassures this Court that the consideration of many motives poses no constitutional problems. He says many motives, such as pecuniary motives, are content and viewpoint neutral because they do "not implicate the defendant's opinions or beliefs" (respondent's brief at 13). But this proposition is faulty at its core because it ignores the tests for content and viewpoint neutrality. Regulations on speech are content-based when they regulate categories of speech or topics. If a law cannot be justified without reference to the content of the speech, it is content-based. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Laws are viewpoint-based when they go beyond singling out categories or topics and actually specify particular viewpoints. *E.g., Schacht v. United States*, 398 U.S. 58, 63 (1970). Under these tests, the consideration of all criminal motives involves an assessment of content and viewpoint.

For example, we can only determine whether there is a pecuniary motive by looking to the "content" of the motive. Consideration of the motive is inextricable from the type of motive involved. And the consideration of pecuniary motives is not viewpoint neutral. In theft crimes, a desire to feed one's family is treated differently than a desire to buy illegal drugs. Moreover, pecuniary motives are not apolitical. In a society based on private ownership, views on greed and who is entitled to property are inherently political.

The logical extension of Mitchell's argument is that the *Dawson* and *Barclay* decisions are invalid to the extent they approve the consideration of racial hate motives. If, according to Mitchell, the First Amendment is violated when racial hate motives are considered because such motives undoubtedly reflect "a viewpoint on a political and social issue" (respondent's brief at 13), then the sentencing judge in *Barclay* should not have considered Barclay's racial motive. The penalty enhancer context does not provide a relevant distinction. If an offender receives a longer sentence solely because of his motive, the same First Amendment issue arises whether that increase occurs in the context of underlying penalty parameters or in an enhanced penalty range.

Furthermore, Mitchell could not reasonably argue that laws against conduct infringe on protected thought whenever they reflect a moral judgment about a societal issue. "'The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991), quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was a rational basis for sodomy law).

The application of content-based and viewpoint-based restrictions developed in a free speech context to statutes proscribing criminal conduct would interfere with state legislative authority to make moral judgments about the severity of conduct. Although states "must remain neutral in the marketplace of ideas," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978), they must not remain neutral in assessing the morality of criminal conduct. Wisconsin has the

authority and a moral obligation to confront discriminatory conduct. While the State cannot and should not combat discrimination or promote racial harmony by prohibiting disfavored speech or punishing people for holding disfavored beliefs, it can certainly fight discrimination, as it has done here and in other anti-discrimination laws, by giving special consideration to discriminatory motives that prompt particularly harmful conduct.

Mitchell's suggestion that this Court apply content-based and viewpoint-based First Amendment doctrine to conduct or to motives for conduct is an invitation to examine countless moral and practical judgments on the content of criminal motives, both by legislatures and by trial courts that impose differing sentences because of differing motives. And these judgments about the content of motives are not limited to the criminal arena. Accordingly, this Court should be reluctant to "'embark the judiciary on a long and difficult journey to . . . an uncertain destination.'" *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1990), quoting *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

III. NEITHER *DAWSON* NOR *BARCLAY* IS DISTINGUISHABLE ON THE BASIS THAT IT INVOLVED AN INDIVIDUALIZED DISPOSITION IN THE ABSENCE OF A PENALTY ENHANCER.

Mitchell contends that the State's reliance on *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), is misplaced (respondent's brief at 16). He initially asserts that those cases only support consideration of a racial hate motive when it is relevant to what he labels a "content-neutral" factor such as "lack of remorse, the effects on victims, risk of

death to many people, or that the offense was committed 'in a particularly cruel and heinous manner'" (respondent's brief at 16). There may be no disagreement here, depending on what Mitchell means by "content-neutral." The State does tie the enhancer to such "content-neutral" factors: nature of the crime, deterrence, dangerousness of offender and the effects on the victim and the targeted group.

Mitchell's main argument appears to be this. It is permissible, in the absence of a discrimination crime penalty enhancer, for a judge to increase a sentence because of the presence of a racial hatred motive because in that situation judges look to individualized facts to see whether harms are actually present. In contrast, the penalty enhancer is an improper "per se surrogate" for such individualized consideration (respondent's brief at 16; see also 25, 29, 30). But this argument misses the mark for at least two reasons.

First, the Wisconsin law is an individualized sentencing law. It does not specify the penalty to be imposed. A sentencing judge is completely free to impose a sentence below the maximum for the underlying offense or even to impose no prison or fine at all. The law leaves judges free to tailor sentences to the facts of each case.[4]

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[4]The enhancer does have one mandatory aspect that did not apply in the instant case. It directs that a single class of misdemeanors, Class A misdemeanors, become felonies if the enhancer is proven. Wis. Stat. § 939.645(2)(b). Of course, if this mandatory aspect were held unconstitutional, it could be severed from the remainder of the statute which is at issue here. But Wisconsin does not rest its constitutional argument on the non-mandatory nature of its penalty enhancer. Although the Wisconsin legislature thought it wise to leave discretion with the sentencing judge, it could have determined that there are evils

Second, criminals have no federal constitutional right to individualized sentencing in a non-capital case. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701-02 (1991); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Thus, for example, a sex offender could not complain about a mandatory sentence based on his assertion that his victim was an infant oblivious to the assault and, therefore, that the victim harms contemplated by the legislature were not present.

Recently, in *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), this Court upheld a mandatory enhancement for a defendant's perjury in the context of the Federal Sentencing Guidelines. This Court did not concern itself with whether there was a justification for the increase in every case. Rather, it upheld the law, stating:

> A sentence enhancement based on perjury does deter false testimony in much the same way as a separate prosecution for perjury. But the enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. . . . It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. . . .
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inherent in discrimination crimes and created mandatory minimum penalties.

> . . . And that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds, in these circumstances, for its invalidation.

Id. at 1118.

IV. THE RESPONDENT'S PROFFERED DISTINCTIONS BETWEEN THE WISCONSIN ENHANCER AND OTHER ANTI-DISCRIMINATION LAWS IGNORE THE DIFFERING POWERS AND INTERESTS OF STATE AND FEDERAL GOVERNMENT.

Mitchell suggests that this Court should feel free to strike down the enhancer without fear that other anti-discrimination laws are at risk. He says that even if those other anti-discrimination laws "turn on motive in the same way as" the enhancer, they are nonetheless constitutional because "they are narrowly drawn to infringe upon First Amendment rights only insofar as necessary to serve the governmental interests for which they were enacted" (respondent's brief at 38). But his attempts at explaining why the enhancer is different than civil rights laws or other anti-discrimination laws in any relevant respect lack substance.

He seems to say that the federal anti-discrimination laws he cites serve a more compelling state interest because they are designed to protect constitutional and statutory rights. This argument simply ignores the state's compelling interest in protecting its citizens from a particularly harmful type of crime: crime committed because of the status of the victim. *See R.A.V.*, 112 S. Ct. at 2549-50 (safeguarding the right of group members to "live in peace where they wish" is a compelling state interest); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (state has a compelling interest in eradicating discrimination against its citizens). The State's interest in the enhancer is not less legitimate or less compelling than the interests served by the federal anti-discrimination laws that Mitchell identifies.[5]

Mitchell's suggestion that elimination of the enhancer would not deprive the state of the ability to deal with the criminal conduct (respondent's brief at 39), is based on the erroneous assumption that the state legislature may not make the judgment that discrimination crime is a distinct crime and distinct societal problem warranting increased attention and resources.

Mitchell also makes a puzzling argument regarding a distinction between governmental intervention in "public sphere" discrimination and "private" discrimination (respondent's brief at 39-41). He first contrasts the "public sphere" area that the federal anti-discrimination laws cover with the area covered by the enhancer. He seems to believe that the discrimination aspect of a crime addressed by the enhancer is a "private" act and that states have no power to deal with private acts of discrimination.

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[5]Mitchell argues that if the "harmful effects of 'a distinctive idea'" can suffice as a compelling state interest justifying the penalty enhancer, then there is no reason states could not use the same reasoning to prohibit marches, books and speech on particular topics (respondent's brief at 22). However, the State has not asserted that the harmful effects of speech, no matter how demonstrable, serve as justification for the suppression of speech. Even unprotected speech cannot be regulated based on content. *R.A.V.*, 112 S. Ct. 2538. At the same time, the constitution does not require a blind eye toward the harmful effects of discriminatory *conduct*, even if part of that harmful effect is emotional harm. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986).

Mitchell's analysis ignores fundamental differences between state and federal authority. The federal government is one of enumerated, delegated powers only. It has no plenary power to provide for the general welfare, but has only those powers that are expressly conferred upon it and reasonably to be implied therefrom. The states and their legislatures, in contrast, have all governmental powers except those specifically reserved or denied. *See United States v. Butler*, 296 U.S. 1, 64-65 (1936); *Hall v. Wisconsin*, 103 U.S. 5, 11 (1880); *Patterson v. Kentucky*, 97 U.S. 501, 503-04 (1879). The states have plenary police power to legislate to protect the lives, health and property of their citizens, to prohibit things reasonably thought to bring evil or harm to their people and to protect the well-being of the community. *See Patterson v. Kentucky*, 97 U.S. at 503; *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949); *Whalen v. Roe*, 429 U.S. 589, 597 (1977).[6]

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[6]Mitchell attacks the justifications for the exercise of state plenary authority offered by the State. One of his arguments merits a response here. He disputes the assertion that discrimination crimes are increasing in number, thus warranting penalties with a greater deterrent effect. But his reliance on the most recent Anti-Defamation League report for the proposition that such crime is not increasing is misplaced. While there has been a one year dip in anti-Semitic incidents for 1992, the small drop follows five yearly increases, from 1986 to 1991. *See* Brief of *Amici Curiae* the Anti-Defamation League, et al., at 5-6; *cf. Gregg v. Georgia*, 428 U.S. 153, 186 n.34 (1976) (this Court pointed to an increasing trend in the number of murders, despite a decline in the most recent year). Mitchell's reliance on FBI and Wisconsin Sentencing Commission data is equally misplaced. The FBI data collection system is in its infancy with just a fraction of police agencies participating. *See* Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, New York Times, January 6, 1993, at A8. The Wisconsin Sentencing Commission data on felony convictions do not deal with trends, do not reflect all felony charges and do not reflect misdemeanors. On the other hand, there are several indicators that discrimination crime is on the rise. *See* Brief of *Amici Curiae* of the California Association of Human Rights Organizations, et al., at A-1; Brief for Lawyers' Committee for Civil Rights of the San Francisco Bay Area, at 17-19; *see also* Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. Law & Policy Rev., at 174-75 (Winter 1992-93); Klanwatch Intelligence Report, February 1993; Associated Press *Study Says Gay Bashing Is Up*, New York Times, March 13, 1993, at 9.

The "club" cases Mitchell relies on, such as *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), pit the plenary authority of states to prevent discrimination against First Amendment associational rights of citizens. Thus, the question in those cases was not whether states have general authority to prohibit private discrimination. The question was whether specific state actions violated First Amendment rights. Todd Mitchell could not credibly claim that he has an associational right to criminally victimize whomever he chooses.

Therefore, whatever the limits on federal power to prohibit private acts of discrimination, Mitchell has not shown that states are generally prevented from enacting such laws. The proper question remains: does the Wisconsin enhancer violate the constitution because it effectively regulates a protected First Amendment activity. The answer, as shown above and in the State's opening brief, is no.[7]

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[7]Although the enhancer should not be subjected to strict scrutiny analysis, it would pass such scrutiny. The law is permissible because it serves a compelling state interest and is "necessary" to serve that interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1851-52 (1992); *R.A.V.*, 112 S. Ct. at 2549-50. There is no doubt that a state has a compelling interest in eradicating discrimination against its citizens. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The purpose of the Wisconsin penalty enhancer is to deter acts of violence and other crimes directed at citizens because of their status, that is, to deter

V. THE WISCONSIN ENHANCER IS CONSTITUTIONAL AS APPLIED TO "SPEECH-CRIMES"; BUT EVEN IF SUCH APPLICATIONS WERE QUESTIONABLE, FACIAL INVALIDATION IS NOT REQUIRED.

Mitchell contends that the enhancer is facially invalid because it can be applied to crimes committed by the use of words, such as defamation and disorderly conduct (respondent's brief at 31-32). However, if the penalty enhancer is properly applied to "speech-crimes," there is no First Amendment problem. "Speech-crimes" are still criminal acts. If a "speech-crime" victim is selected because of the victim's status, an act of discrimination occurs just as surely as it does under Title VII when the act of discrimination consists entirely of words. The enhancer no more authorizes the punishment of the content of the speech than does Title VII. The content of speech is only relevant insofar as it evidences intentional selection and informs on legitimate dispositional factors, such as the nature of the conduct,

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discrimination which takes criminal form. The law is necessary because enhanced penalties create greater deterrence, lead to increased public protection by allowing longer quarantine periods for offenders, and allow for the imposition of punishment that the legislature has deemed appropriate for this more serious crime.

The State notes that Mitchell is mistaken when he asserts that Wisconsin analogized the enhancer to the draft card destruction law in *United States v. O'Brien*, 391 U.S. 367 (1968) (respondent's brief at 14). The only reference the State made to *O'Brien* was in a footnote refuting the suggestion that discrimination crimes can be considered expressive conduct (brief of petitioner at 13 n.1). And once again, the point was not that the enhancer could not survive the level of scrutiny applied in *O'Brien*, but that it should not be subjected to scrutiny reserved for regulations on expression.

the harm caused and the offender's criminal dangerousness.

Furthermore, Mitchell's argument runs directly counter to this Court's language in *R.A.V.*. If the Wisconsin enhancer *only* applied to the state disorderly conduct statute, a law that includes a general prohibition on fighting words, Wisconsin would have precisely the same law described with apparent approval in *R.A.V.*, a "prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); . . ." *Id.* at 2548 (emphasis in original).

Finally, even if the application of the enhancer to crimes not before the Court were problematic, the result is not facial invalidation. A statute is not facially invalid simply because it is capable of unconstitutional applications. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989) (Texas flag burning statute not struck down on its face because it was capable of constitutional applications); *see also Street v. New York*, 394 U.S. 576, 580-81 (1969); *cf. Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (facial invalidation may be appropriate when statute has vagueness flaws, even though legitimate applications are possible).

VI. THE WISCONSIN STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE AND IT IS NOT UNCONSTITUTIONALLY VAGUE.

Mitchell's equal protection and vagueness claims should be summarily rejected by this court.[8] His equal protection claim has no life apart from the First Amendment question this Court accepted for review. His only argument is that the enhancer should undergo strict scrutiny because it treats people differently based on protected First Amendment rights (respondent's brief at 43–44). Resolution of the direct First Amendment claim disposes of this issue also.

Mitchell's vagueness claim lacks merit on its face. He contends the phrase "because of" is unconstitutionally vague because it does not specify precisely what role the victim's status must play in victim selection: the sole reason, a predominant reason, a contributing reason, a minor reason or an unconscious reason (respondent's brief at 47). He asserts this statutory ambiguity is

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[8]The state appellate court declined to consider Mitchell's equal protection claim because he did not raise it in the trial court, as required under Wisconsin law to preserve the issue for appeal (J.A. at 17). The state supreme court simply indicated in a footnote that it would not consider either the vagueness or equal protection claims because it found the statute facially unconstitutional on First Amendment grounds (J.A. at 28). In any event, the equal protection arguments Mitchell raises in this Court are not the arguments he made in the state appellate courts (see state supreme court brief of defendant-appellant-petitioner at 21–24; court of appeals brief at 13–15). Under state law, Mitchell's failure to challenge the statute as unconstitutionally vague in the trial court did not preclude appellate court review (J.A. at 17). However, in this Court, Mitchell expands considerably the vagueness claim he argued in the state courts.

heightened by a recent amendment to the statute. But his argument misconstrues the nature of a vagueness claim. Statutory ambiguity is not the equivalent of vagueness.

Just because a statute is ambiguous does not make it unconstitutionally vague. *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990). New statutes frequently contain ambiguities. *Id.* If that made them vague, it would be difficult to enact valid laws. *Id.* "A statute that contains one or several ambiguities that can be dispelled at a stroke by interpretation . . . is not vague in the constitutional sense. . . . [O]nce the [state court] resolve[s] [the statutory interpretation question] the ambiguity" is dispelled. *Id.*

Mitchell cannot base a vagueness challenge on the ground that the enhancer might even apply where the status of the victim was an insignificant or unconscious factor. *See Smith v. Goguen*, 415 U.S. 566, 577–78 (1974); *Parker v. Levy*, 417 U.S. 733, 760 (1974). And the enhancer unquestionably gave Mitchell notice that his conduct put him in jeopardy. Whatever the precise meaning of the language, it unquestionably applied to Mitchell's conduct in this case, where he directed a criminal attack on his victim, saying to his accomplices, "'Do you all feel hyped up to move on some white people?'" and "'There goes a white boy; go get him'" (J.A. at 28–29).

The State is not aware of any case in which a court has found an anti-discrimination statute unconstitutionally vague because it employs the phrase "because of" and there is no reason to do so here.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be vacated and the case remanded.

Respectfully submitted,

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18 U.S.C. § 245. Federally protected activities

(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been--

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer"

means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

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42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1985. Conspiracy to interfere with civil rights

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603 (b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

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42 U.S.C. § 3613. Enforcement by private persons

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

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42 U.S.C. § 3614. Enforcement by the Attorney General

(d) Relief which may be granted in civil actions under subsections (a) and (b)

(1) In a civil action under subsection (a) or (b) of this section, the court--

(C) may, to vindicate the public interest, assess a civil penalty against the respondent.

SUBCHAPTER II--PREVENTION OF INTIMIDATION

42 U.S.C. § 3631. Violations; bodily injury; death; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wis. Stat. 101.22 (6) (h) 3.

3. In addition to any damages ordered under subd. 1, the administrative law judge may assess a forfeiture against a respondent who is a natural person in an amount not exceeding $10,000, unless the respondent who is a natural person has been adjudged to have committed any prior discriminatory act under sub. (2), (2m) or (2r). If a respondent who is a natural person has been adjudged to have committed one other prior discriminatory act under sub. (2), (2m) or (2r) based on an offense date that is before

September 1, 1992, the administrative law judge may assess a forfeiture in an amount not exceeding $25,000. If a respondent who is a natural person has been adjudged to have committed 2 or more prior discriminatory acts under sub. (2), (2m) or (2r) based on an offense date that is before September 1, 1992, the administrative law judge may assess a forfeiture in an amount not exceeding $50,000.

Wis. Stat. 101.22 (6m) (a)

(6m) CIVIL ACTIONS. (a) Any person, including the state, alleging a violation of sub. (2), (2m) or (2r) may bring a civil action for injunctive relief, for damages, including punitive damages, and, in the case of a prevailing plaintiff, for court costs and reasonable attorney fees.

Wis. Stat. 101.22 (10) (d)

(d) *Penalty.* 1. A person who wilfully violates sub. (9) or any lawful order issued under this subsection shall, for the first violation, forfeit not less than $100 nor more than $1,000.

Wis. Stat. 111.321 Prohibited bases of discrimination. Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or

this state or use or nonuse of lawful products off the employer's premises during nonworking hours.

Wis. Stat. 111.322 Discriminatory actions prohibited. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

(2m) To discharge or otherwise discriminate against any individual because of any of the following:

(a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(c) The individual files a complaint or attempts to enforce a right under s. 66.293 or 103.49 or testifies or assists in any action or proceeding under s. 66.293 or 103.49.

(d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Wis. Stat. 904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Wis. Stat. 904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wis. Stat. 940.20(2)

(2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class D felony.

No. 92-515

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, PETITIONER

v.

TODD MITCHELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether it violates the First Amendment for a State to authorize an enhanced criminal sentence when the defendant selects his victim because of the victim's race, religion, color, or other protected status.

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INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment permits the enhancement of a criminal sentence when the defendant has selected his victim because of the victim's race, religion, color, or other protected status. A variety of federal criminal laws punish intentional discrimination on the basis of race, religion, or other characteristics. See, *e.g.*, 18 U.S.C. 242, 243, 245; 42 U.S.C. 3631. And the Sentencing Guidelines permit an upward adjustment in the offense level when the victim's racial or ethnic characteristics make him particularly vulnerable and thereby played a significant role in the defendant's selection of his victim. See Sentencing Guidelines § 3A1.1 (covering offenses where the victim's vulnerability contributed to the defendant's decision to commit the offense); *United States* v. *Salyer*, 893 F.2d 113, 115-

116 (6th Cir. 1989).[1] Because this case has implications for the constitutionality of those measures and for federal antidiscrimination law generally, the United States has a significant interest in its outcome.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech * * *." Wisconsin Statute § 939.645 (1989-90) is set forth in the appendix to this brief.[2]

STATEMENT

1. On October 7, 1989, respondent and several other black men and boys were gathered at an apartment complex in Kenosha, Wisconsin. Respondent was 19 at the time and was among the older persons in the group. After the group had discussed a scene in the movie "Mississippi Burning" in which a white

[1] In addition, Congress in 1990 enacted the Hate Crime Statistics Act requiring the Attorney General to acquire data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pub. L. No. 101-275, § 1(b)(1), 104 Stat. 140, codified at 28 U.S.C. 534 note. In 1992, the House passed a bill that would direct the Sentencing Commission to promulgate guidelines to provide sentencing enhancements for "hate crimes," *i.e.*, crimes "in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." H.R. 4797, 102d Cong., 2d Sess. § 2(b) (1992). A counterpart bill was introduced in the Senate, S. 2522, 102d Cong., 2d Sess. (1992), but did not pass.

[2] In 1992, the Wisconsin legislature amended Section 939.645 in several respects. See Pet. App. A12 n.12. The amended provision is not at issue in this case.

man beat a black boy who was praying, respondent stated: "Do you all feel hyped up to move on some white people?" Soon thereafter, a 14-year-old white male, Gregory Riddick, walked by the apartment complex on the opposite side of the street from the group. Respondent said: "You all want to fuck somebody up? There goes a white boy; go get him." After counting to three, respondent pointed in Riddick's direction. Pet. App. A3, A54.

Several members of the group ran toward Riddick, knocked him down, severely beat him, and stole his tennis shoes. Riddick was rendered unconscious and remained in a coma for four days. He suffered extensive injuries, including brain damage. Pet. App. A3, A54-A55.

2. After a jury trial, respondent was convicted of aggravated battery, in violation of Wis. Stat. §§ 939.05 and 940.19(1m). That offense carries a maximum sentence of two years' imprisonment. Wis. Stat. §§ 940.19(1m), 939.50(3)(e). Because the jury also found that respondent had intentionally selected the victim because of his race, Pet. App. A55, the potential maximum sentence for respondent's crime was increased to seven years under Wis. Stat. § 939.645(2)(c) (1989-90), which authorizes such enhancement when the defendant "[i]ntentionally selects the person against whom the crime * * * is committed * * * because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person * * *." Wis. Stat. § 939.645 (1)(b) (1989-90). The circuit court rejected respondent's contention that the enhancement provision is unconstitutional, Pet. App. A63, and sentenced respondent to four years' imprisonment for the aggra-

vated battery. *Id.* at A3-A4.[3] The court of appeals affirmed the conviction and sentence. Pet. App. A53-A62.

3. The Wisconsin Supreme Court reversed. Pet. App. A1-A52. It held that the sentencing enhancement provision of the "hate crimes" statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech." *Id.* at A7.

The court rejected the State's contention that the statute punishes only the racially based selection of the victim, and does not punish "bigoted thought." Pet. App. A8. The court stated that the enhancement provision "punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Id.* at A8. According to the court, the enhanced "punishment of the defendant's bigoted motive * * * directly implicates and encroaches upon First Amendment rights." *Id.* at A10; see *id.* at A14-A15.[4]

The court found support for its holding in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992). Pet. App. A15-A16. In *R.A.V.*, this Court struck down on First Amendment grounds a city ordinance that selectively punished only those "fighting words" that involved

[3] Respondent was also convicted of theft, but the jury did not find that respondent selected Riddick as a theft victim because of his race. Pet. App. A4 n.3, A55. The theft conviction is not before this Court.

[4] The court recognized that the statute as written does not specifically target subjective bias, bigotry, or prejudice, Pet. App. A11, and that the statute covers cases in which the defendant is not biased. *Id.* at A14 n.13. The court concluded, however, that the "intent and practical effect of the law" was "punishment of offensive motive or thought." *Id.* at A11.

"messages of 'bias-motivated' hatred." 112 S. Ct. at 2542, 2548. While noting that the ordinance in *R.A.V.* "is clearly distinguishable" from the Wisconsin sentencing enhancement law, Pet. App. A16, the state court relied on the principle of *R.A.V.*—that legislators may not express hostility to particular biases "through the means of imposing unique limitations upon speakers who * * * disagree." 112 S. Ct. at 2550. The court thought that principle to be relevant in this case, because "[t]he ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance—racial or other discriminatory animus." Pet. App. A16.[5]

The court also held the sentencing enhancement provision to be unconstitutionally overbroad, because the defendant's words would frequently be introduced as evidence of his discriminatory selection of the victim. Pet. App. A17-A19. The court reasoned that the evidentiary use of the defendant's words would have a "chilling effect" on free speech. *Id.* at A18.

The court purported to distinguish the hate crimes statute from federal and state antidiscrimination laws. Although noting that this Court has repeatedly rejected First Amendment challenges to those laws, Pet. App. A19-A21 & n.20, the court stated that antidiscrimination laws prohibit the "discriminatory act,"

[5] The court noted that in *Dawson* v. *Delaware*, 112 S. Ct. 1093, 1098 (1992), this Court held that the First Amendment does not bar consideration in a sentencing proceeding of the "elements of racial hatred" in the defendant's crime. The court, however, viewed that principle as inapplicable when the defendant is already subject to punishment for the underlying crime and the State then adds "to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." Pet. App. A16 n.17.

and not the "mental process" of selecting the victim, which is the effect of the hate crimes statute. Pet. App. A20. Moreover, the court stated, antidiscrimination laws pose less of a threat to First Amendment values because they impose only civil, not criminal, penalties. *Id.* at A21.

Justice Abrahamson dissented, stating that while "[f]reedom of speech is the most treasured right in a free, democratic society," the sentencing enhancement statute "is a prohibition on conduct, not belief or expression." Pet. App. A23, A25. She concluded that, because "[t]he statute does nothing more than assign consequences to invidiously discriminatory acts," *id.* at A25, it is valid under the First Amendment. Justice Bablitch filed a separate dissent, arguing that the hate crimes statute is valid as a law "against discrimination, pure and simple," and does not punish thoughts, but "acting upon those thoughts." *Id.* at A27-A28. "The Constitution," he concluded, "allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them." *Id.* at A28.

SUMMARY OF ARGUMENT

Wisconsin law authorizes enhanced criminal penalties when the defendant intentionally selects his victim because of race, religion, color, or other protected status. Wis. Stat. § 939.645 (1989-90). The Wisconsin Supreme Court held that the State's enhancement provision violates the First Amendment by punishing bigoted thought and chilling protected speech. That conclusion is wrong for four reasons.

A. In *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992), this Court held that the First Amendment does not impose a per se bar to consideration in a sentencing proceeding of the beliefs that prompted the defendant's commission of a crime. Rather, such beliefs can be examined when they are relevant to a legitimate sentencing issue. In seeking to determine an appropriate sentence, courts have traditionally enjoyed broad freedom to consider the reasons for the crime and its consequences to victims. The same principles apply in sentencing for crimes in which the defendant selects his victim because of the victim's membership in a particular group. A State may permissibly conclude that such group-based targeting exacerbates the individual and social harm of the crime, and requires a greater degree of deterrence. Wisconsin's sentencing enhancement provision properly responds to those considerations.

B. The Wisconsin provision is also analogous to many federal and state antidiscrimination laws, which have long been recognized as valid under the First Amendment. There is no First Amendment right to engage in acts of discrimination. Just as the Constitution does not protect conduct with a discriminatory purpose in commercial transactions, it does not protect conduct with a discriminatory purpose in criminal "transactions." The long history of civil rights legislation in this country confirms that it is legitimate to punish acts that are committed with discriminatory intent. There is no persuasive reason for distinguishing Wisconsin's antidiscrimination provision from those other antidiscrimination laws.

C. In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2548 (1992), this Court struck down on First Amendment grounds a municipal ordinance that singled out for punishment only those "fighting words" that expressed "messages of 'bias-motivated' hatred." *R.A.V.* is inapplicable here. Wisconsin's law punishes discriminatory conduct, not speech, symbolic

expression, or thought. The enhancement of punishment when the defendant selects his victim because of the victim's group affiliation does not punish thought in the abstract; it addresses the harms triggered by class-based criminal conduct. While the Constitution protects the right to harbor and express bigoted ideas, it does not confer the right to commit crimes based on those beliefs.

D. Finally, the Wisconsin law does not unconstitutionally chill protected speech. Although the defendant's words may be used as evidence that he intentionally selected the victim because of a protected characteristic, the same is true in any criminal case requiring proof of purpose or intent, including federal antidiscrimination prosecutions. The First Amendment does not bar the evidentiary use of words to prove the elements of a crime or to justify an enhanced sentence.

ARGUMENT

ENHANCING CRIMINAL PENALTIES WHEN THE DEFENDANT SELECTS THE VICTIM BECAUSE OF HIS RACE, RELIGION, COLOR, OR OTHER PROTECTED STATUS DOES NOT VIOLATE THE FIRST AMENDMENT

The First Amendment embodies this country's deep commitment to freedom of speech and thought. This country is also committed, however, to the protection of individuals from criminal activity that is aimed at them because of their race, religion, or other distinctive characteristic. Wisconsin's sentencing enhancement provision furthers the government's obligation to safeguard its citizens from such invidious crimes, and it does so without suppressing speech or punishing beliefs.

A. A Sentencing Court May Consider A Defendant's Selection Of His Victim Because Of The Victim's Protected Status

1. In *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992), this Court recognized that the First Amendment does not bar consideration of the defendant's associations and beliefs when they are relevant to a legitimate sentencing issue. In that case, the State introduced evidence at a capital sentencing hearing that the defendant had the words "Aryan Brotherhood" tattooed on his hand and that the Aryan Brotherhood was a "white racist prison gang that began * * * in response to other gangs of racial minorities." *Id.* at 1096. Dawson contended that the First Amendment "forbids the consideration in sentencing of any evidence concerning [protected] beliefs or activities," but this Court rejected that contention as "too broad." *Id.* at 1097. Noting that sentencing authorities have traditionally been able to draw on a "wide range of relevant material," *ibid.*, the Court concluded that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." 112 S. Ct. at 1097.

The principle of *Dawson* applies to the Wisconsin penalty enhancement scheme. Wisconsin has authorized sentencing courts to impose a greater maximum sentence when the factfinder determines that the defendant "[i]ntentionally select[ed] the person against whom the crime * * * [was] committed * * * because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person * * *." Wis. Stat. § 939.645(1)(b) (1989-90). As *Dawson* makes clear, the presence of racial motive in

the selection of a crime victim is a permissible consideration in sentencing. 112 S. Ct. at 1097-1098. *Dawson* noted that in *Barclay* v. *Florida*, 463 U.S. 939 (1983), the Court had upheld the admission of "evidence of racial intolerance and subversive advocacy" where that evidence was "relevant to the issues involved." 112 S. Ct. at 1097.

The Court in *Dawson* found a constitutional violation only because the evidence admitted in that case was not shown to be relevant to the sentencing proceeding. 112 S. Ct. at 1097-1098. The Court emphasized, however, that if Dawson's membership in a white racist prison gang had been "tied in any way to the murder of Dawson's victim," or had been shown to be relevant to some other aggravating factor, such as the defendant's future danger to society, it would have been constitutional for the jury to consider it. 112 S. Ct. at 1098.

The Wisconsin Supreme Court sought to distinguish *Dawson* by stating that it is one thing to consider a defendant's "evil motive" in sentencing the defendant for a particular crime, but it is "quite a different matter to sentence for that underlying crime and then add a separate enhancer directed solely to punish the evil motive." Pet. App. A16 n.17. That distinction is unpersuasive. If "the elements of racial hatred" in the commission of a murder can make the difference between life imprisonment and a capital sentence, see *Barclay* v. *Florida*, 463 U.S. at 949 (plurality opinion), the sentence has been "enhanced" because of the "evil [racial] motive." In similar fashion, under the Wisconsin sentencing scheme the commission of aggravated battery may result in an enhanced sentence when the defendant's selection of his victim is animated by the victim's race.

Nor is *Dawson* inapplicable because the victim-selection enhancement in this case is embodied in a statute. Just as it does not violate the First Amendment for a judge to consider "the elements of racial hatred" in the defendant's crime, *Dawson*, 112 S. Ct. at 1097, it does not violate the First Amendment for the legislature to authorize such consideration. If a court in a particular case may consider the race-based selection of the victim in sentencing, it is constitutionally permissible for the legislature to direct courts to do so generally. See *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring) ("the responsibility for making these fundamental [sentencing] choices and implementing them lies with the legislature"); *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 (1991) (the legislature "has the power to define criminal punishment without giving the courts any sentencing discretion").[6]

2. The principle that the First Amendment does not bar consideration of the racial elements in a crime follows from two basic characteristics of this country's sentencing system. First, the inquiry conducted by sentencing courts has traditionally been a wide-ranging one. As this Court has noted, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446

[6] Respondent argues (Br. in Opp. 16) that *Barclay* and *Dawson* authorize consideration of racial selection only in connection with a "content-neutral statutory aggravating factor." Nothing in *Dawson* or *Barclay* suggests such a limitation. There is no reason grounded in the First Amendment for permitting a court to consider the racial selection of a crime victim only when the legislature has not specifically identified that factor as a relevant consideration.

(1972); see *United States* v. *Grayson*, 438 U.S. 41, 50 (1978). "[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949); see also 18 U.S.C. 3661; Fed. R. Crim. P. 32(c)(2).

This Court recently applied that principle in upholding the admission of victim impact evidence in a capital sentencing proceeding. *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991). The Court noted that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material," and that evidence of the "specific harm caused by the crime in question" belongs to a class of evidence "long considered by sentencing authorities." *Id.* at 2606, 2608. As *Payne* indicates, in-depth exploration of the defendant's character and the circumstances of his crime is deeply rooted in the sentencing traditions of this country.

Second, the States have considerable latitude in determining the appropriate goals to be served by their criminal sentencing systems, *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring), and the factors that their courts should consider in determining the appropriate sentence. That latitude extends to permitting a court to consider the particularized harm, and the broader injury to social values, caused by the defendant's conduct. *Payne* v. *Tennessee*, 111 S. Ct. at 2605 ("the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the

elements of the offense and in determining the appropriate punishment"); *id.* at 2628 (Stevens, J., dissenting) ("an evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines").

Those principles are inconsistent with the Wisconsin Supreme Court's view that the First Amendment bars a legislature from concluding that some states of mind accompanying the commission of a crime are deserving of special condemnation through enhanced punishment. If the Wisconsin court were correct, it would be impermissible to punish a spy more severely when his intention was to harm his country rather than to support the ideas of a spouse, or to punish a thief more severely when his motive was to satisfy greed rather than to feed his family. Such a rule would be contrary to the history of sentencing practices in this country.

3. In light of those principles, a State may permissibly determine that a crime warrants more severe punishment when the defendant has targeted a victim based on a factor such as his race. There is a broad consensus in our society that a defendant's selection of a victim because of the victim's membership in a racial, religious, or ethnic group inflicts harm above and beyond the crime itself.[7] Several factors support that conclusion.

First, a group-based crime inflicts a distinctive injury on the individual victim by instilling or rein-

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[7] That consensus is reflected in the fact that 46 States and the District of Columbia have enacted provisions designed to address the issue of hate crimes. See Anti-Defamation League of B'nai B'rith, *Hate Crimes Statutes: A 1991 Status Report*, App. C, at 24-26 (1991) (collecting hate-crime statutes).

forcing fears that he is exposed to danger simply because of his race, religious affiliation, or other group characteristic. While all victims of violent crime suffer a profound sense of personal invasion, the sense of vulnerability when one is attacked because of membership in a particular group adds a further dimension to the injury. Second, crimes based on race or religion harm not only the individual victims, but also other members of the victim's group. The selection of one group member for crime because of his group identity threatens the personal safety and security of other members of that group, solely because of their shared characteristic.[8]

In addition to those concerns that directly relate to harms to victims, a State may conclude that enhanced punishment of such crimes is needed to provide adequate deterrence. Criminals who select their victims because of membership in particular groups may act out of hate, or out of a sense that particular minorities are simply more vulnerable targets for criminal conduct. Because particular individuals may feel a greater incentive to commit group-based crimes, enhanced penalties for crimes against members of such groups may be necessary to deter those offenders from acting. Moreover, a State may determine that

[8] See S. Rep. No. 721, 90th Cong., 1st Sess. 7 (1967) ("Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro community of their Federal rights to nondiscriminatory treatment."). Crimes based on the race or religion of the victim are "most unsettling to the victims because there is nothing they can do to alter the situation, nor is there anything that they should be expected to change. Not only is the individual who is personally touched by these offenses victimized, but the entire class of individuals residing in the community is affected." FBI, *Training Guide For Hate Crime Data Collection* 1 (1991).

group-based crimes are more likely to stimulate either copycat or retaliatory "hate crimes." A State may take special measures to deter crimes that could stimulate a cycle of violence in the community. In short, the criminal justice system has legitimate reasons for enhancing sentences for defendants who target and commit crimes against members of particular groups.[9]

4. Although the First Amendment does not bar the consideration in a sentencing proceeding of the defendant's reasons for selecting a particular victim, the Constitution does bar punishment of the defendant for his "abstract beliefs" when they "have no bearing on the issue being tried," but simply are viewed as "morally reprehensible." *Dawson* v. *Delaware*, 112 S. Ct. at 1098-1099. Wisconsin's enhancement mechanism does not operate in that fashion.

The Wisconsin law authorizes an enhanced sentence only when there is a connection between the crime and the defendant's mental processes: the defendant must have selected the "person against whom the crime * * * is committed * * * because of" the victim's racial, religious, or other protected status. Wis. Stat. § 939.645(1)(b) (1989-90). There is nothing to suggest that the law authorizes punishment for abstract beliefs unrelated to the defendant's culpabil-

[9] A State may apply that enhancement not only when the victim is an actual member of the targeted group, but also when the victim is selected " 'because of the actor's belief or perception regarding' the victim's status 'whether or not the actor's belief or perception was correct,' " as the amended version of Section 939.645 does. Pet. App. A12 n.12 (quoting Wis. Stat. § 939.645 as amended in 1992). The definition of the law's coverage by reference to the actor's belief or perception seeks to deter any defendant from selecting his victim because of his understanding about the victim's group status; the interest in punishing such crimes does not evaporate simply because the defendant's belief turned out to be wrong.

ity for the crime of which he was convicted. In a particular case, of course, a sentencing judge might overstep the bounds of the First Amendment by enhancing a sentence based solely on the defendant's "abstract beliefs" involving bigotry or prejudice. That risk, however, is present in any sentencing system that allows a measure of discretion to the sentencing authority; it does not render the statute facially invalid.

Sentencing judges may permissibly consider the defendant's selection decision as bearing on the degree of trauma, humiliation, and degradation inflicted on the victim; they may evaluate the injury to the sense of safety and personal security of other members of the same class; and they may take into account the need to deter similar crimes by the defendant or others. None of those purposes punishes "abstract beliefs," and none runs afoul of the First Amendment.

B. Discrimination In The Selection Of A Crime Victim May Be Punished Like Any Other Act Of Discrimination

Beyond the particularized concerns of the sentencing system, Wisconsin's enhancement provision is valid for an additional reason: Wisconsin's protection of particular groups through the criminal process is a form of antidiscrimination law. The constitutionality of the provision is confirmed by this Court's decisions upholding other federal and state antidiscrimination statutes.

1. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that 42 U.S.C. 1981 prohibits private schools from excluding students on the basis of race. The Court also ruled that that prohibition of discriminatory acts does not violate the First Amendment. The Court explained:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison*, 413 U.S. 455 [(1973)], "the Constitution . . . places no value on discrimination," *id.* at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. * * *" *Id.* at 470.

427 U.S. at 176; see also *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93-94 (1945) (labor union has no right to discriminate on the basis of race, creed, or color). The Court made the same point in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), where it held that the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, to sex discrimination in a private law firm does not "infringe constitutional rights of expression or association." 467 U.S. at 78.

More recently, the Court applied the same constitutional rule in upholding state laws forbidding discrimination in membership by private social organizations. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984); *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 544-549 (1987); *New York State Club Ass'n* v. *New York City*, 487 U.S. 1, 10-15 (1988). In *Jaycees*, for example, the Court explained that the state law at issue did not facially "aim at the suppression of speech," nor did it "distinguish between prohibited and permitted activity on the basis of viewpoint," or permit enforcement based

on such criteria. 468 U.S. at 623. The Court concluded that because the state law was narrowly tailored to serve the compelling interest in eradicating discrimination, it did not infringe rights protected by the First Amendment. *Id.* at 622-629.

The principle underlying those cases is equally applicable here. Just as federal and state antidiscrimination statutes seek to combat invidious discrimination in social, academic, and commercial settings, Wisconsin seeks to combat the discriminatory targeting of particular classes of persons in criminal settings. The Constitution does not protect intentional discrimination in social, academic, and commercial transactions; it surely does not protect such discrimination in criminal "transactions." [10]

2. Not only the decisions discussed above, but this country's long history of civil rights legislation refutes any suggestion that the First Amendment pre-

[10] The state court analyzed Wis. Stat. § 939.645 (1989-90) as if it covered only subjective bias or hate, but the court recognized that "the statute as written may extend to situations where the actor in fact is not biased." Pet. App. A14 n.13; *id.* at A11 ("the statute does not specifically phrase the 'because of . . . race, religion, color [etc.]' element in terms of bias or prejudice"). The court merely speculated, based on "the history of anti-bias statutes" in other States, *id.* at A11, that the Wisconsin legislature must have intended to punish biased thought. Read naturally, however, the "intentional selection" provision is a classic antidiscrimination law that focuses on the actor's choice of victim because of status, not on the ideology that may have motivated that choice. Cf. *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (Jan. 13, 1993), slip op. 5 ("We do not think that the 'animus' requirement [of 42 U.S.C. 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex.*").

vents the enhancement of punishment in cases of crimes based on intentional discrimination.

a. Congress has enacted laws prohibiting intentional discrimination against racial or other groups since the Reconstruction era. In 1866, Congress enacted the predecessor to 18 U.S.C. 242, which criminalized, among other things, the infliction, by a person acting under color of state law, of "different punishment, pains, or penalties * * * by reason of [the victim's] color or race, than [are] prescribed for the punishment of white persons." [11] Soon thereafter, Congress enacted the predecessors of 42 U.S.C. 1981 and 1982, which prohibit intentional racial discrimination in the making and enforcement of private contracts and in the sale or rental of real or personal property. *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987). Those statutes, even though they require proof of intentional discrimination, have never been thought to raise First Amendment concerns. In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court cited 18 U.S.C. 242 and 42 U.S.C. 1981 and 1982 as examples of statutes that prohibit conduct on grounds other than its expressive content, and thus are constitutional even when the conduct in question expresses ideas of hostility to a particular group. 112 S. Ct. at 2546-2547.

[11] Act of April 9, 1866, § 2, 14 Stat. 27. A table tracing the evolution of 18 U.S.C. 242 is contained in the appendix to the opinion of Justice Frankfurter in *United States* v. *Williams*, 341 U.S. 70, 82 (1951). Section 242 also prohibits "the deprivation [under color of law] of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. A violation of that prohibition does not depend on a showing of racial intent. *United States* v. *Classic*, 313 U.S. 299, 326-327 (1941).

Just this Term, the Court reaffirmed that a civil action under 42 U.S.C. 1985(3) requires proof of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to establish liability. *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (Jan. 13, 1993), slip op. 3-4, quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Under that rule, private individuals are subject to suit under Section 1985(3) only when they have selected a victim because of the victim's "class-based" identity, and perhaps because of race alone. *Carpenters* v. *Scott*, 463 U.S. 825, 836 (1983). If the Wisconsin Supreme Court were correct in stating that it violates the First Amendment to punish the "racial or other discriminatory animus" underlying specific conduct, Pet. App. A16, this Court's effort to prevent Section 1985(3) from foundering on "constitutional shoals" by creating "general federal tort law," *Griffin*, 403 U.S. at 102, would actually have made the statute an unconstitutional vehicle for suppressing protected thought.

b. In recent years, Congress has enacted additional antidiscrimination laws and has extended the protection of civil rights legislation to persons discriminated against on grounds other than race. For example, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, provides a wide array of civil protections against private discrimination. See, *e.g.*, 42 U.S.C. 2000a(a) (prohibiting discrimination in public accommodations "on the ground of race, color, religion, or national origin"); 42 U.S.C. 2000e-2(a)(1) (prohibiting discrimination in employment "because of * * * race, color, religion, sex, or national origin"). Later legislation followed the same pattern. See 42 U.S.C. 3604 (prohibiting discrimination in housing "because of race, color, religion, sex, familial status, or national origin"); 42 U.S.C. 12112, 12182 (Supp. II 1990) (prohibiting discrimination in employment and public accommodations on the basis of disability).

Congress has also employed criminal remedies in combatting discrimination. In 1968, Congress criminalized interference by force or threat of force with any person "because of his race, color, religion or national origin" with respect to a wide variety of civil rights, including attending public school, enjoying the benefits of federal programs, enjoying employment or union membership, serving on state juries, traveling by common carrier, and using public accommodations.[12] 18 U.S.C. 245(b)(2). The principal purpose of that provision was to combat "racially motivated acts of violence." *Johnson* v. *Mississippi*, 421 U.S. 213, 226 (1975).[13] Similarly, Congress made it a crime for any person to interfere with housing rights "because of [a person's] race, color, religion, sex, handicap * * *, familial status * * *, or national origin." 42 U.S.C. 3631(a).

Those provisions reflect Congress's continuing effort to protect members of racial and other groups from offenses committed against them because of their status. The government has often used those provisions to prosecute bias-related crime. See note 20, *infra*. Wisconsin's law, like those of other States, similarly attempts to deal with the problem of bias-

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[12] Pub. L. No. 90-284, tit. I, § 101(a), 82 Stat. 73.

[13] As the legislative history explained, Section 245 was enacted "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 473, 90th Cong., 1st Sess. 5 (1967) (Section 245 "is designed to meet the problem of present-day racial violence").

related crime, and it is equally compatible with the Constitution.[14]

3. The Wisconsin Supreme Court offered two grounds for concluding that the Wisconsin statute, unlike other antidiscrimination laws, violates the First Amendment. First, the court stated that Wisconsin's sentencing enhancement provision "is solely concerned with the subjective motivation of the actor," while other antidiscrimination laws "involve objective acts of discrimination." Pet. App. A20. That distinction is untenable.

Both federal antidiscrimination law and Wis. Stat. § 939.645 (1989-90) are concerned with "discriminatory acts." Under both, the unlawfulness of those acts is generally established by proof of the discriminatory reason for the actor's "selection decision." [15]

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[14] Because most crime is prosecuted on the state level, and because the problem of bias-related crime transcends federal resources, the availability of state legislation to deal with such crime is critical. The federal government, of course, has a unique role in protecting civil rights under the Post-Civil War Amendments, but federal antidiscrimination law is not distinguishable from state hate crime laws on that basis. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (upholding Civil Rights Act of 1964 under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3); see also *United States* v. *Lane*, 883 F.2d 1484, 1490-1492 (10th Cir. 1989) (upholding 18 U.S.C. 245(b)(2)(C) under the commerce power), cert. denied, 493 U.S. 1059 (1990). States may similarly draw on their police power to protect individuals against bias-related crime.

[15] An exception to that rule exists in disparate impact discrimination cases, where a violation is established based on the effect of a particular practice, not the intent of the actor. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986-987 (1988); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1074, to be codified at 42 U.S.C. 2000e-2(k).

Pet. App. A20 & n.21. The discriminatory act occurs when the protected status of the victim "played a motivating part" in the actor's decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion). The "subjective mental process" of the actor (Pet. App. A20 & n.21) is therefore the ultimate issue. See, *e.g.*, *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981) (ultimate burden" of plaintiff in a Title VII case is to show "intentional discrimination").

Second, the state court said that the federal antidiscrimination statutes carry civil rather than criminal sanctions. Pet. App. A21. That suggestion is incorrect. Purposeful discrimination, in selected contexts, has long violated federal criminal law. See 18 U.S.C. 242, 243, 245; 42 U.S.C. 3631. It is fully appropriate for the States, which bear the primary role in protecting individuals against crimes, to take similar action in response to hate crimes.

C. The Wisconsin Statute Punishes Criminal Conduct, Not Speech Or Ideas

In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court invalidated a municipal ordinance that singled out, from among other "fighting words," symbolic speech that expressed messages of "'bias-motivated' hatred." *Id.* at 2548. *R.A.V.* took as its premise that the ordinance was aimed at the expressive content of the proscribed conduct. Because Wisconsin's law is aimed at the discriminatory criminal act itself, rather than at the expression of ideas, *R.A.V.* is inapplicable to this case.

1. The First Amendment protects the right to hold racist or discriminatory beliefs and to express racist or discriminatory views; government can neither proscribe beliefs nor punish the expression of ideas with

which it disagrees. *United States* v. *Eichman*, 496 U.S. 310 (1990); *Texas* v. *Johnson*, 491 U.S. 397, 414, 418 (1989); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 408 (1950); *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

An individual's right to speak and believe as he sees fit, however, does not embrace the right to commit crimes against particular persons because of their group affiliation. When such crimes are committed, the State may take account of that fact and enhance the punishment to protect group members against crimes targeted at them. That purpose has nothing to do with suppressing disfavored speech or thought.

It is questionable whether the "message" sent by a violent crime against another person could ever constitute protected speech. A political assassination is in some sense the ultimate means of sending a message of opposition to government policy, but a message communicated in that way cannot possibly be thought to enjoy any First Amendment protection.[16] Even if a crime against another person because of his group affiliation could be said to have expressive aspects, the expressive component of the conduct is not what Wis. Stat. § 939.645 (1989-90) targets. The enhancement scheme deals with the harms resulting from the crime; it does not "proscribe particular conduct *because* it has expressive elements." *Texas* v. *Johnson*,

[16] See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991) (plurality opinion); *Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989).

491 U.S. at 406; see *R.A.V.*, 112 S. Ct. at 2542; *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968).

The Wisconsin Supreme Court acknowledged that the Wisconsin law does not target expression.[17] It reasoned, however, that, because the underlying conduct (here, an aggravated battery) is already subject to criminal prosecution, the sentencing enhancement provision must have been aimed at the ideology of prejudice that presumably animated the defendant's selection of his victim. Pet. App. A8, A10. The court concluded that the law therefore creates a "thought crime," and held that "[p]unishment of one's thought, however repugnant the thought, is unconstitutional." *Id.* at A14-A15, A20 n.21.

The flaw in the court's analysis is that the Wisconsin law does not punish bigotry in the abstract; the enhanced punishment is available only when the State shows that the defendant victimized a class member because of his status. Individuals remain free to hold racist beliefs and to express racist ideas; what they may not do is act on those views by committing crimes against protected persons. As this Court has explained:

> [A]cts of invidious discrimination * * * cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such [discriminatory] practices are entitled to no constitutional protection.

Roberts v. *United States Jaycees*, 468 U.S. at 628.

[17] Pet. App. A15 n.15 ("Nor is it argued that a hate crime is protected expressive conduct. It is not.").

2. In *R.A.V.* v. *City of St. Paul*, a municipal ordinance made it a misdemeanor to use "fighting words" that inflicted emotional harm on the basis of race, color, creed, religion, or gender.[18] *R.A.V.* held that, even in a category of "proscribable" speech, the selective prohibition of expression based on its subject matter violates the First Amendment principle that government may not suppress speech on the basis of its content or because the government is hostile to a particular message. 112 S. Ct. at 2545. The Court explained that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547. "[M]ajority preferences," the Court stated, "must be expressed in some fashion other than silencing speech on the basis of its content," *id.* at 2548, or by "imposing unique limitations upon speakers who * * * disagree." *Id.* at 2550.

The concerns expressed in *R.A.V.* about the suppression of disfavored speech are not implicated here. The Wisconsin law does not silence speech or censor thought; it deals with conduct. Unlike the St. Paul ordinance, which explicitly barred any "symbol," "appellation," or "graffiti" that expressed "messages

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[18] The ordinance in *R.A.V.* stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul Legis. Code § 292.02 (1990), quoted in *R.A.V.*, 112 S. Ct. at 2541. The Minnesota Supreme Court construed the ordinance to apply only to "fighting words." 112 S. Ct. at 2541, citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

of bias-motivated hatred and in particular * * * messages based on virulent notions of racial supremacy," 112 S. Ct. at 2541, 2548, Wisconsin does not punish any form of expression or disfavored "messages"; it punishes victim-selective crimes.

In *R.A.V.*, the Court stated that "[w]hat we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause)." *Id.* at 2548. In this case, what Wisconsin has *is* a prohibition of criminal conduct "directed at certain persons or groups," *ibid.*; the law does not work the direct, content-based regulation of "expression," "messages," or "speech" (*id.* at 2549) that the Court condemned in *R.A.V.* In the terms used by the Court in *R.A.V.*, the Wisconsin statute "does not target conduct on the basis of its expressive content"; the acts penalized by the Wisconsin statute therefore "are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S. Ct. at 2546-2547.[19]

Wisconsin's statute is quite different from respondent's hypothetical flag-burning statute in which public burning is generally prohibited and a "penalty enhancer * * * would apply whenever a person commits the offense * * * 'because of' his opposition to

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[19] It is not surprising that *R.A.V.* casts no doubt on Wisconsin's sentencing enhancement scheme, given that the Court decided *Dawson* v. *Delaware*, *supra*, only months before, and *R.A.V.* did not suggest that its holding in any way conflicted with *Dawson*. Moreover, the opinion in *R.A.V.* underscored that the concerns raised by the content-based regulation of speech do not apply to antidiscrimination laws, which (like Wisconsin's law) aim at "conduct" and only "incidentally" affect speech. 112 S. Ct. at 2546-2547.

the policies of the government." Br. in Opp. 8. Such an enhancement would be invalid under *Texas* v. *Johnson*, 491 U.S. 397 (1989), because it would punish expressive conduct based on its content. But it is not true that "this is precisely the effect of Wisconsin's hate crimes law." Br. in Opp. 8. The Wisconsin statute does not enhance a defendant's punishment because the offense is committed to express opposition to a particular racial or religious group, or even because the defendant harbors bigoted beliefs. It provides for enhancement if the defendant has selected his victim because of the victim's protected status, regardless of whether the defendant is biased against members of that group, and regardless of whether the defendant acted with the desire to make a statement about his beliefs. Moreover, respondent's hypothetical statute would have no purpose or effect other than to deter and punish protected beliefs and their expression. In contrast, enhanced punishment for the selection of a victim "because of" the victim's racial or protected status responds directly to the harms inflicted on victims and on society by the targeting of victims based on their status.

D. The Wisconsin Statute Does Not Unconstitutionally Chill Protected Speech

As a separate First Amendment objection, the Wisconsin Supreme Court held that the enhancement statute has an impermissible "chilling effect" on free speech. Pet. App. A17. The court based that conclusion on the fact that "speech may often be used as circumstantial evidence to prove the actor's intentional selection." *Id.* at A18. That analysis is incorrect.

The First Amendment does not forbid the use of words to establish the elements of a crime or to prove

the defendant's motive or intent. The best available evidence of intent often comes from what the defendant has said. Any issue that requires proof of an individual's purpose or intent therefore may depend on proof of the spoken or written word or of expressive conduct. If that evidentiary use of speech violated the Constitution, much of the criminal law would be unenforceable; this Court has made clear that the First Amendment does not have that effect. For example, in *Street* v. *New York*, 394 U.S. 576, 594 (1969), the Court ruled that a State may not directly punish protected speech, but it noted that "nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way." See also *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965).

Proof of discriminatory purpose is no exception. This Court has found no constitutional bar to using the defendant's speech in assessing claims of discrimination. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (noting that "remarks at work" revealing "sex stereotypes" were relevant to employment discrimination claim). Likewise, when defendants are charged with racially motivated crimes, courts routinely admit evidence of the defendant's speech or associations to show the necessary discriminatory purpose and intent, without any suggestion that to do so violates First Amendment rights.[20]

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[20] See, *e.g.*, *United States* v. *McInnis*, 976 F.2d 1226, 1230-1232 (9th Cir. 1992) (defendant's shouting of racial epithets at black neighbors and possession of items emblazoned with swastikas admissible to establish his racial hatred and his acting on that hatred in firing gun at neighbors, thus interfering with their occupancy of their home on the basis of

In this case, the Wisconsin law does not prohibit or punish speech or expression; words may simply be relevant to the issue of "intentional selection" of the victim because of the victim's particular status. Often, that same evidence would be admissible in the trial of the underlying crime, to establish the defendant's motive or the circumstances surrounding the event, and that evidentiary use has never been found to be troublesome under the First Amendment. The Wisconsin statute therefore does not have the effect of unconstitutionally "chilling" protected speech.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

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race, in violation of 42 U.S.C. 3631); *United States* v. *Gresser*, 935 F.2d 96, 101 (6th Cir.) (shouting of racial epithets admitted in prosecution based on cross-burning outside of black family's residence), cert. denied, 112 S. Ct. 239 (1991); *United States* v. *Skillman*, 922 F.2d 1370, 1372-1374 (9th Cir. 1990) (racist statements and desire to associate with "skinheads" admissible to show racial animus in prosecution for burning cross on black family's lawn), cert. dismissed, 112 S. Ct. 353 (1991); *United States* v. *Lane*, 883 F.2d 1484, 1495-1496 (10th Cir. 1989) (defendant's criticism of radio talk show host's derision of the Ku Klux Klan and perceived slights to the white race admissible in prosecution for killing the host in violation of 18 U.S.C. 245); *United States* v. *Ebens*, 800 F.2d 1422, 1427-1430 (6th Cir. 1986) (racist remarks made to Asian man admissible to show defendant's intent to interfere with victim's use of public facility and motivation in killing him); *United States* v. *Redwine*, 715 F.2d 315, 319-322 (7th Cir. 1983) (prior racist comments admissible to show racially motivated harassment and fire bombing of black family's house), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Franklin*, 704 F.2d 1183, 1188 (10th Cir. 1983) (racist statements and beliefs admissible to show that killings occurred "because of the[] race" of the victim), cert. denied, 464 U.S. 845 (1983).

Respectfully submitted.

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JANUARY 1993

APPENDIX

Wis. Stat. § 939.645 (1989-90) provides:

> **Penalty; crimes committed against certain people or property.** (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be in-

creased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60153

Supreme Court, U.S.
FILED
NOV 5 1992
OFFICE OF THE CLERK

(5) (5)

Nos. 92-515 and 92-568

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OCTOBER TERM, 1992

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v.
TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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Printed by Authority of the State of Illinois (P.O. 35624—60—10-26-92)

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INTEREST OF THE AMICI CURIAE

The Amici States, through their attorneys general, respectfully submit this brief in support of the petitioners in two cases, *Wisconsin v. Mitchell*, No. 92-515, and *Ohio v. Wyant*, No. 92-568, urging this Court to grant the petitions for writ of certiorari and reverse the decisions of the Wisconsin Supreme Court and Ohio Supreme Court. This case provides the Court with the opportunity to review the constitutionality of hate crime statutes significantly different from the one struck down in *R.A.V. v. City of St. Paul*, 505 U.S. ____, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), namely, the various forms of "penalty enhancement" statutes that authorize sentencing judges to impose more severe sentences on criminals whose crimes were motivated by discriminatory intent.

Amici States have a substantial interest in combatting the pernicious effect of hate crime on its victims and society as a whole. Consequently, the Amici States, among others, have passed hate crime statutes in response to such a problem. Some of the statutes are substantially similar to the Wisconsin and Ohio laws that were struck down by their state supreme courts. An example is an Illinois statute that provides in relevant part:

> Factors in Aggravation. (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence under Section 5-8-1:
>
> * * *
>
> (10) the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender,

sexual orientation, physical or mental disability, or national origin. . . .

Ill. Rev. Stat. ch. 38, ¶ 1005-5-3.2 (1991).[1]

Amici States believe that not only are penalty enhancement, and indeed all, hate crime laws vulnerable to challenge based on the faulty analysis employed by the courts below, but that their civil discrimination laws may also be vulnerable. These laws contain operative language found in the hate crime statutes struck down by the courts below. Amici States have a strong interest in the continued validity of antidiscrimination statutes that form the very foundation of civil rights laws in their states. This Court is urged to grant the petitions for writ of certiorari to explore fully the First Amendment implications of penalty enhancement statutes and to consider the impact of recent rulings on the many state and federal antidiscrimination laws that target conduct based on specified motivation.

SUMMARY OF ARGUMENT

Recent news coverage has revealed the serious and growing national problem of hate crime. States have a substantial interest in fighting the pernicious effect hate crime has on its victims and society as a whole. Amici States submit that they may constitutionally fight this problem as an exercise of their traditional police powers. Some states

[1] Illinois has also enacted a substantive hate crime statute, under which the commission of certain crimes "by reason of" the race, color, creed, religion and other specified characteristics of the victim is subject to penalties (Ill. Rev. Stat. ch. 38, ¶ 12-7.1 (1991)). Further examples of statutes allowing a defendant's bias motive to be considered as a factor in sentencing include N.J. Stat. Ann. § 2C:44-3; N.H. Rev. Stat. Ann. § 651:6I(g).

have responded to the stubborn problem of hate crimes by passing statutes that enhance the penalty for certain predicate offenses committed "because of" or "by reason of" the victim's race, religion, or other protected class. Two of these statutes, Wis. Stat. § 939.645 and Ohio Rev. Code § 2927.12, have recently been struck down by their respective state supreme courts. Those courts relied for their holdings on a faulty analysis of *R.A.V.* and other federal decisions that discuss the reach of the First Amendment.

Many states have penalty enhancement hate crime statutes substantially similar to the statutes struck down. These statutes would be vulnerable to challenge under the analyses employed by the courts below. Furthermore, most if not all states have civil antidiscrimination laws that contain operative language the same as or similar to the operative language in the hate crime statutes struck down; thus, these laws are also vulnerable under the reasoning of the courts below. Because the holdings of those courts will have such far-reaching impact on First Amendment jurisprudence at the state court level, this Court should rectify the lower courts' analyses and uphold the constitutional validity of penalty enhancement hate crime statutes and state antidiscrimination laws.

Finally, other state courts have upheld or are currently reviewing similar hate crime statutes against First Amendment challenges. Granting the petitions for writ of certiorari, therefore, will give this Court an opportunity to resolve a conflict among state courts as to the appropriate reach of the First Amendment to penalty enhancement hate crime statutes.

ARGUMENT IN SUPPORT OF CERTIORARI

I.

THE SERIOUS AND GROWING PROBLEM OF HATE CRIME REQUIRES AN APPROPRIATE STATE LEGISLATIVE RESPONSE.

On January 6, 1992, in New York City, it was reported that a 14-year old black male and his 12-year old sister were jumped by four white teenagers who beat them, robbed them of $3.00, shaved off the girl's hair, and sprayed them with white shoe polish while shouting, "You'll be white today!" Glave, *Hate Crime Against Children Sparks Concern In A Hard Town*, The Associated Press, January 10, 1992, Domestic News Section (*"Hate Crime Concern"*). Over the last three years, the number of hate crimes reported to the Chicago police, like the one described above, has been steadily rising. Reardon, *Hate Crimes Touch Raw Nerve In City*, Chicago Tribune, July 8, 1992, at p. 1. Unfortunately, the Chicago experience is not unique; the incidence of hate crimes is up all across the nation,[2] along with a broadening of the perpetrators and targets of hate. Welch, *Tensions Between Clashing Cultures Lead to More Hate Crimes*, The Associated Press, September 9, 1991, Washington Dateline Section. One aspect of this trend as a national phenomenon is well documented by the Anti-Defamation League of B'nai B'rith: the number of anti-

[2] For example, hate crimes increased 18 percent in 1991 in New Jersey, which was the fourth year in a row of an increase in reports of hate crimes. Gray, *Bias Crime Rate Up 18%, And Juveniles Led The Surge*, New York Times, April 4, 1992, § 1 at 29. In Los Angeles County, hate crimes reached record levels in 1991 for the seventh consecutive year, an increase of 22% over 1990. Chavez, *Hate Crimes Set A Record in L.A. County*, Los Angeles Times, March 20, 1992, § A at 1 (*"L.A. Hate Crimes"*).

Semitic incidents committed across the nation during 1990 was the highest total ever reported in the 12-year history of the ADL's study of the problem. *Hate Crimes Statutes: 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991) at p. 1 ("ADL Status Report"). "Everyone who collects data reports a steady increase in hate crimes in the last year or two." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, New York Times, May 29, 1990, § C at 1 (*"Roots of Racism"*).[3]

In addition to the unsettling trend toward a higher incidence of hate crimes, the violent nature of the crimes and the effects on the victims and society at large are particularly disturbing. Scientists have found that hate crimes are often vicious; for example, hate crime assaults are "far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than is true for other assaults." *Roots of Racism, supra.* Furthermore, the level of violence is increasing. *L.A. Hate Crimes, supra.* Nevertheless, hate crimes often "wound the psyche more than the body and leave a residue of painful distrust and fitful dreams." Kleinfield, *Bias Crimes Hold Steady, But Leave Many Scars*, New York Times, January 27, 1992, § A at 1. Moreover, all members of a victim's group are affected by a hate crime, and some act

[3] *See also*, Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270, 1270 (1988) (Article cited sources that found "an alarming trend of increased racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country"). Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 Yale L.J. 845, 846 (1990); Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 103 (1984).

out their anger by responding with counterattacks. *Hate Crime Sparks Concern, supra.* Because a hate crime may escalate into mob violence, these crimes have potential impacts on the community that differ from those resulting from similar acts committed without a bias motive. As the American Bar Association Section of Criminal Justice reported:

> [M]any criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.* The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, Criminal Justice, Summer 1988, at 19, 20 (emphasis in original).

Clearly, states have a substantial interest in fighting the devastating effect that hate crime has on its victims and society as a whole, as outlined above.[4] Furthermore, combatting hate crime is obviously within the constitutional power of the states as exercises of their traditional police powers to protect the health, safety and welfare of their citizens. State laws that enhance the penalties for hate crime are a rational way to apply that police power. These laws are not directed at the expression of ideas, but are meant to regulate conduct of a particularly malicious type.

[4] The federal government, as well as the states, has recognized the need to address by statute the problem of bias-motivated crime; it has already addressed the consummate hate crime, genocide, 18 U.S.C. § 1091 *et seq.*, and has proposed H.R. 4797, "The Hate Crimes Sentencing Enhancement Act of 1992."

Amici States submit that hate crime is conduct and does not implicate free expression at all. Any expressive element that may be involved in the conduct is merely "swept up incidentally within the reach of [the] statute." *R.A.V.*, 505 U.S. at ____, 112 S. Ct. at 2546, 120 L. Ed. 2d at 321. Moreover, the legislative response of enacting penalty enhancement statutes is no greater than necessary to achieve the governmental interest of fighting this especially pernicious class of crimes. By treating bias-motivated crime as something more egregious than the predicate offense, states send an important message to the perpetrators of hate crimes that the increased harm to victims and society from their conduct will be punished accordingly. Thus, the imposition of a greater penalty for hate crime is not merely rationally related to the purpose of combatting such crime, it is closely tailored to the greater societal harm created by hate crime.

II.

THIS COURT SHOULD GRANT THE PETITIONS FOR WRIT OF CERTIORARI TO REVIEW THE SPECIFIC PROVISIONS OF THE WISCONSIN AND OHIO STATUTES IN ORDER TO CLARIFY THE CONSTITUTIONALITY OF STATE STATUTES WITH THE SAME OR SIMILAR LANGUAGE.

In their efforts to combat bias-motivated crime, states have adopted a variety of measures.[5] One approach was recently struck down by this Court as a regulation of speech in violation of the First Amendment of the United States Constitution. *R.A.V., supra.* Another approach, substantially different from the one examined in *R.A.V.*,

[5] According to the ADL Status Report, 46 states have some type of hate crime law.

provides enhanced penalties for criminal activity that is motivated by bias. Two statutes of the latter type, Wis. Stat. § 939.645 and Ohio Revised Code § 2927.12, were recently struck down by the supreme courts in their respective states, whose holdings relied on an analysis of *R.A.V. State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992), and *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). Although the constitutional issues presented in reviewing the two statutes are similar, the statutes are worded differently. While Amici States believe both statutes are constitutional, the allowance of both petitions will give the Court an opportunity to discuss fully the permissible range of alternative legislative enactments to combat hate crime.

1. Examining The Difference Between The Wisconsin And Ohio Statutes Will Guide States In Evaluating Their Own Hate Crime Statutes.

Wis. Stat. § 939.645, at the time of the defendant's crimes in *Mitchell*,[6] provided for an increase in the penalty to be exacted for the underlying crime if a person:

> Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Although the basic thrust of Ohio Rev. Code § 2927.12 is the same, the language differs substantially:

[6] The May 1992 amended version of the Wisconsin statute is discussed in a footnote of the *Mitchell* opinion. See Appendix to petition for writ of certiorari in *Wisconsin v. Mitchell* at A.12-A.13.

> (A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code *by reason of the race, color, religion, or national origin of another person or group of persons.*
>
> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation. (Emphasis added).

The two statutes differ in several respects. The Ohio law enhances the penalty for particular predicate offenses by creating an independent offense of ethnic intimidation, whereas the Wisconsin law enhances the penalty for particular predicate offenses by simply changing the scope of penalty allowable for the predicate offense. Moreover, the Wisconsin statute specifically requires intentional selection, whereas the Ohio statute accomplishes the same goal simply through the use of "by reason of" language. Further, the Ohio statute protects a person who is victimized because of his association with a "group of persons" and is thus broader in the range of people covered than the Wisconsin statute, which is limited to persons chosen as victims only because of their own characteristics. Finally, the Wisconsin statute includes more protected classes of persons and different predicate offenses than the Ohio law. Both statutes are, however, fairly included in the category of penalty enhancers and both are distinguishable from the ordinance struck down in *R.A.V.* Determining that both these legislative responses to the problem of hate crime are constitutional will help states determine that their particular penalty enhancement hate

crime statutes are permissible under the First Amendment.

2. Civil Antidiscrimination Laws May Be Vulnerable Under The Reasoning of *Mitchell* and *Wyant*.

Most, if not all, states have statutes similar to Title VII that prohibit discrimination on account of race, color, religion or other protected classes. *See, e.g.*, Ill. Rev. Stat. ch. 68, ¶¶ 1-101 *et seq.* (1991). These statutes contain language the same as or similar to the "because of" or "by reason of" language found in the hate crimes statutes at issue here, thus similarly leading a fact finder to examine the discriminatory action of the perpetrator. For instance, some antidiscrimination statutes prohibit discrimination in housing "because of race, color, religion, sex, or national origin." Ohio Rev. Code § 4112.02(H).[7] These antidiscrimination statutes are constitutional because:

> [a]s long as it is the underlying discriminatory behavior that is being regulated, the First Amendment is not offended, for under the analysis in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968)] the penalty exacted on speech in such cases is incidental to the governmental purpose of regulating the purely non-expressive component of the conduct.

Statement of Rodney A. Smolla, Arthur B. Hanson Professor of Law and Director of the Institute of the Bill of Rights Law at the College of William and Mary, before the Subcommittee on Crime and Criminal Justice of the

[7] Ohio Rev. Code § 4112.02(H)(12) prohibits any person from intimidating another because of the exercise of any right protected or granted by the section. Ohio also has made criminal the same conduct. *See* Ohio Rev. Code § 2927.03. If one applied the reasoning of the *Wyant* decision, the validity of this criminal statute and its civil counterpart obviously would be cast into doubt.

U.S. House of Representatives regarding H.R. 4797,[8] July 29, 1992, at pp. 38-9 (hereinafter referred to as "Smolla Statement").

The constitutionality of penalty enhancement hate crime statutes depends on the same analysis. Thus, if such statutes are struck down because they penalize the harm caused by selecting victims just because of who they are, then antidiscrimination statutes that operate in exactly the same way might similarly be viewed as unconstitutional. The analysis employed by the courts in *Mitchell* and *Wyant* could be used to undermine statutes that form the very foundation of civil rights law in their states. Amici States urge this Court to grant the petitions for certiorari to clarify the continued constitutionality of the many state antidiscrimination laws.

3. The *Mitchell* and *Wyant* Analyses of Federal Case Law Are Flawed.

Not only are the decisions below far reaching, but their analyses of federal case law are fundamentally flawed. Both courts used a simplistic interpretation of *R.A.V.* to support their decision to strike down penalty enhancement hate crime laws. However, as shown above, those laws resemble antidiscrimination statutes which this Court in *R.A.V.* explicitly excluded from its holding:

> since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class

[8] Bill proposing "The Hate Crimes Sentencing Enhancement Act of 1992," H.R. 4797, 102d Congress, 2d Session (1992).

> of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, ... Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 505 U.S. at ____, 112 S. Ct. at 2546-47, 120 L. Ed. 2d at 321-22 (citations omitted). Thus, contrary to the courts' analyses in *Mitchell* and *Wyant*, "laws that increase the penalties for bias-motivated crimes in which expressive activity *has nothing to do with the elements of the crime* would not seem to be affected by the *R.A.V.* ruling, and should not run foul of the First Amendment." Smolla Statement at p. 41 (emphasis in original). Granting the petitions for certiorari is particularly warranted where, as here, the highest state courts misconstrue federal precedent to support a decision at odds with that precedent.

Furthermore, Amici States urge this Court to grant the petitions for certiorari to overturn state court decisions in direct conflict with *Dawson v. Delaware*, 503 U.S. ____, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). In *Dawson*, this Court found that a court's consideration, in the sentencing phase of a trial, of evidence of the defendant's membership in a white power group was improper because that membership did not motivate the crimes committed. *Id.*, 112 S. Ct. at 1098. However, the Court explained that where the motive is causally connected to the crime at issue, the motive may be considered when determining a sentence. *Id.* at 1097. As Professor Smolla explained, the *Dawson* case thus stands for two propositions relevant to the application of the First Amendment to penalty enhancement hate crimes statutes:

> First, the constitutional protection for freedom of expression extends to the penalty phase of the criminal justice process. Second, . . . it would *not* be constitutionally permissible for federal courts to enhance sentences merely on the basis of evidence that a convicted defendant has "abstract beliefs" that are racist, or is a member in a racist organization. Rather, the sentencing court must base its enhancement on evidence that the specific crime for which the defendant was convicted was in fact motivated by the type of prejudice proscribed by [the penalty enhancement hate crime statutes].

Smolla Statement at p. 6 (emphasis in original). Application of the *Dawson* principles then would lead a court to uphold a penalty enhancement hate crime law *if* it can be shown that the predicate offense resulted from a defendant's discriminatory motive. Thus, by striking down penalty enhancement hate crime statutes under the First Amendment and *R.A.V.*, the *Mitchell* and *Wyant* courts neglected to square their holdings with the important principles enunciated in *Dawson*, and their decisions should be overturned.

4. Granting The Petitions Will Resolve A Conflict In State Court Decisions.

In contrast to the courts' holdings in *Mitchell* and *Wyant*, other state courts have upheld similar statutes. Most notably, the Oregon Supreme Court recently upheld Oregon's hate crime law. *State v. Plowman*, 314 Or. 157, ____ P.2d ____, 1992 Ore. LEXIS 158 (August 27, 1992). The court recognized the limited reach of *R.A.V.*, finding that the Oregon hate crime law "is a law directed against conduct, not a law directed against the substance of speech." *Id.*, 1992 Ore. LEXIS 158 at *20-*21. The court also anticipated a conflict among state supreme courts by specifically disagreeing with the reasoning of *Mitchell*. *Id.*, 1992 Ore.

LEXIS 158 at *22. *See also Dobbins v. State*, 17 Fla. Law W. D2222, 1992 Fla. App. LEXIS 10062 (September 24, 1992).

Other state supreme courts are currently reviewing their states' penalty enhancement hate crime laws. *See State v. Stalder*, 599 So.2d 1280, 1992 Fla. LEXIS 1027 at *1 (Fla. 1992) (Florida Supreme Court accepted jurisdiction to "pass[ ] upon a question of great public importance requiring immediate resolution by this Court"); *State v. LaDue*, No. 91-313 (Vermont Sup. Ct., docketing statement filed March 9, 1992). This Court should grant the petitions for writ of certiorari to resolve a conflict among state courts as to the appropriate reach of the First Amendment to this type of statute.

CONCLUSION

Amici States strongly urge this Court to grant the petitions for writ of certiorari and to determine the constitutionality of penalty enhancement hate crime statutes in general and in the context of the distinctions between the Wisconsin and Ohio statutes, to give direction to the many states with similar statutes and to make clear the continued validity of state antidiscrimination laws.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

No. 92-515

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.[1]

The Lawyers' Committee is a legal services organization which, since 1968, has provided free legal services to communities

[1] *Amicus* is aware of the Petition for Certiorari which has been filed by the State of Ohio and in filing this brief in support of the State of Wisconsin's petition is not stating a preference. *Amicus* was unable to sufficiently prepare to file a brief in the cases of *Ohio v. Wyant*, *Ohio v. May*, and *Ohio v. Van Gundy* (collectively United States Supreme Court No. 92-568) but would encourage this Court's review of all of these cases to permit resolution of many of the broader and important issues which have arisen since this Court's decision in *R.A.V. v. City of St. Paul*, ____ U.S. ____, 112 S. Ct. 2538 (1992).

traditionally underrepresented within our society. A primary mandate of the Lawyers' Committee is to represent individuals and communities in the San Francisco Bay Area who have experienced discrimination because of their race, ethnicity, national origin, color or immigration status. For twenty-five years, the Lawyers' Committee has worked closely with communities of color and immigrant and refugee communities to ensure that their civil rights are protected and enforced.

In 1991, the Lawyers' Committee initiated its Racial Violence Project. The Racial Violence Project is designed to address both the effects and root causes of racially motivated violence throughout the San Francisco Bay Area. The Project's primary efforts include providing public education about and encouraging utilization of California's hate violence and hate crime laws.

The case of *Wisconsin v. Mitchell*, 485 N.W.2d 807 (1992), raises issues of great importance to the clients served by this *amicus curiae*. California's hate crimes laws are a vital link in the chain of legislative and law enforcement efforts to safeguard the civil rights of individuals from traditionally underrepresented communities. The California Legislature drafted these laws to combat the increasing incidence of discriminatory and bias-motivated violence. The Legislature did so taking great care not to infringe upon guaranteed First Amendment rights. The statute involved in the present case is substantially similar to several of the California statutes. Therefore, if the Wisconsin statute is found to be unconstitutional, the validity of the California statutes may also be implicated.[2]

---

[2]Presently, there are at least three cases focusing on the constitutionality of several of California's hate crime statutes pending in the California appellate courts.

II.

SUMMARY OF ARGUMENT

> Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro [sic] community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.[3]

Though clearly not a new phenomenon, the occurrence of "hate violence" and "hate crimes" is on the rise in California and throughout the country.[4] A variety of theories have been advanced about the causes of this recent increase in bias-motivated activity, from economic hard times to a lack of political leadership on issues of diversity. Whatever the cause, however, such incidents are indeed becoming more frequent.[5] In San Francisco alone, according to statistics compiled by the San Francisco Police Department's Hate Crimes Unit, there were a total of 401 incidents of hate violence and crime reported to the police during 1991.[6] Since most victims do not report incidents to the police for a variety of cultural and political reasons, the actual figure, in all likelihood, is significantly higher.

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[3]S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.N.A. 1837, 1842 (1969).

[4]The terms "hate violence" and "hate crime" are generally understood to encompass harassing, intimidating, violent behavior and conduct, motivated by bias or discrimination. *See California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, Final Report (April 1990); H. Ehrlich, *Campus Ethnoviolence and the Policy Options*, National Institute Against Prejudice & Violence, Report No. 4 (March 1990).

[5]*See 1991 Audit of Anti-Semitic Acts*, Anti-Defamation League (1992); *California Attorney General's Report, supra*; P. Ephross, A. Barnes, H. Ehrlich, K. Sandnes and J. Weiss, *The Ethnoviolence Project — Pilot Study*, National Institute Against Prejudice & Violence, Report No. 1 (Oct. 1986); J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts 1983-1987* (1989).

[6]Memorandum re Yearly Recap of Hate Crimes Statistics 1991, from Officer S. Bargini of the Hate Crimes Unit of the San Francisco Police Department to Captain J. Willet, Commanding Officer, Special Investigations Division of the San Francisco Police Department (Jan. 16, 1992).

Responding to these threats to its citizens, the California Legislature passed civil and criminal statutes which provide remedies to victims as well as recourse for the State against perpetrators of hate violence and hate crime. Penal Code section 422.7, the sentence-enhancement provision similar to the statute at issue in *Mitchell,* is an integral part of this scheme of civil rights laws.[7] The constitutionality of the Wisconsin statute is

[7]California Penal Code section 422.6 provides:

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.
>
> • • • •
>
> (c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Section 422.7 provides a felony enhancement where:

> [T]he crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation. . . .

Similarly, the statute at issue in *Mitchell* provides:

> 939.645. Penalty; crimes committed against certain people or property:
>
> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided . . .
>
> (a) Commits a crime . . .
>
> (b) Intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wisconsin Stat. Ann. § 939.645 (West 1991).

thus an important issue not only to Wisconsin but also to all other states, such as California, that have enacted similar laws.

Based on this Court's recent decision in *R.A.V.*, the *Mitchell* court held that the Wisconsin sentence-enhancement provision constitutes an impermissible, content-based prohibition on the First Amendment right to free speech. Its reasoning is faulty at best. In *R.A.V.*, this Court found facially invalid a local ordinance that specifically prohibited the expression of certain viewpoints. Sentence-enhancement provisions for bias-motivated crimes, in contrast, criminalize activity on a content-neutral basis and punish only conduct. The First Amendment is not implicated by this type of criminal statute because it does not regulate, nor interfere with, the right to free expression. Rather, the statute's aim, as well as its effect, is to prohibit *discriminatory conduct*, a compelling legislative goal.

Several decisions from courts in other states reach the contrary, and, *amicus* believes correct, conclusion by refusing to apply *any* First Amendment scrutiny to similar statutes. To the extent that *Mitchell* conflicts with these decisions of other state courts, as well as established federal precedent, this Court should review the decision and establish a uniform rule.

Finally, even assuming that the enforcement of the sentence-enhancement does implicate expressive rights, the provision at

issue in *Mitchell* is a content-neutral law which only secondarily affects conduct's expressive elements. As such, the Wisconsin statute passes constitutional muster under the well-established test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

III.

ARGUMENT

A. THE VALIDITY OF HATE CRIME SENTENCE-ENHANCEMENT STATUTES PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW THAT THIS COURT SHOULD DECIDE.

California, with other states, has a strong interest in preventing hate violence.[8] Bias-motivated crimes have a particularly pernicious effect on both the victim and the community at large.

The hatred, bias and bigotry that motivate perpetrators to commit bias-motivated crimes distinguish such crimes from other assaults, threats of violence or acts of vandalism. Studies indicate that hate crimes more often involve physical assault than conventional crimes. For example, the Department of Justice has found that approximately 10% of reported conventional crimes are personal assaults, while the remaining 90% are directed at property. *Report to the Nation on Crime and Justice*, U.S. Department of Justice, at 12 (2d ed. 1988). Statistics reported from several police departments, however, indicate that more than 30% of bias-motivated crimes are personal assaults. B. Levin, *A Practical Approach to Bias Crimes for Police* (1992); *see also Hate Crime In Massachusetts — Preliminary Annual Report — January-December 1990*, Executive Office of Public Safety Criminal History Systems Board, Crime Reporting Unit, at 3 (Jan. 24, 1991). Similarly, the National Institute Against Prejudice and Violence reported that physical assault was the most common form of bias-motivated crime, accounting for 24.8% of bias-motivated crimes reported in its sample. *The Ethnoviolence Project-Pilot Study, supra*, at 5.

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[8]With regard to the State's interest in "[ensuring] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish," the Court in *R.A.V.* concluded: "We do not doubt that these interests are compelling...." *R.A.V.*, 112 S. Ct. at 2549.

In California, recent studies indicate that hate crimes occur every day and are at "an all-time high." *Freedom From Fear — Ending California's Hate Violence Epidemic*, Final Report of the Lieutenant Governor's Commission on the Prevention of Hate Violence, at 1 (May 1992). The Lieutenant Governor's Report provides an alarming amalgam of hate crimes statistics from 1991, including:

- The Anti-Defamation League of B'nai B'rith ("ADL") reported a 34 percent rise in attacks and threats against Jews in California.
- The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them.
- The National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473 — an 11 percent increase — reported in San Francisco by Community United Against Violence.
- In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the Los Angeles County region, a 22 percent increase over 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish people, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.
- A marked increase in physical assaults over other manifestations of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.
- With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence, and continue to be the favored targets. Latinos have also been a major target, particularly here in California with its large and growing Latino population. Asian Americans have suffered increased levels of violence directed at them as economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. Arab Americans were victimized by numerous attacks, threats and vandalism before, during, and after the Persian Gulf War of 1991.

Id. at 1-2. Based on these facts, the Lieutenant Governor concluded: "We characterize these trends, we think not overdramatically, as an epidemic of hate violence." *Id.* at 2.

Certainly the states have an important interest in ending what, at least in California, has been characterized as an "epidemic" of hate violence. Numerous courts, both federal and state, have so held. *See United States v. Gilbert,* 813 F.2d 1523 (9th Cir.), *cert. denied,* 484 U.S. 860 (1987); *United States v. Bledsoe,* 728 F.2d 1094 (8th Cir.), *cert. denied,* 469 U.S. 838 (1984); *New York v. Grupe,* 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988); *Oregon v. Beebe,* 680 P.2d 11, 13 (Or. Ct. App. 1984). This Court's review of the constitutionality of such laws would provide clear guidance to state legislatures as they struggle to remedy these reprehensible crimes.

B. THE WISCONSIN SUPREME COURT IN *MITCHELL* MISAPPLIED WELL-SETTLED FIRST AMENDMENT LAW TO REACH AN ERRONEOUS RESULT.

First Amendment interests simply are not implicated by legislation that allows for the enhancement of sentences for persons who perpetrate crimes against certain classes of citizens. Crimes such as assault or murder are not activities that are vested with any First Amendment protection. Sentence-enhancement statutes like Wisconsin's provide increased penalties when such conduct, that is already criminalized, is inflicted in a discriminatory manner. Just as the underlying crime itself involves no First Amendment interests, neither does that crime's discriminatory motive or method of execution.

This Court has long held that the First Amendment protects expression and not conduct. *See Spence v. Washington,* 418 U.S. 405, 409 (1974). By its very terms, the First Amendment shelters simply speech: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. Admittedly, courts have extended First Amendment protection to conduct imbued with a high degree of expression. Thus, this Court has struck down government regulations prohibiting conduct which is so saturated by expressive qualities that regulation of the act is tantamount to impermissibly inhibiting the actor's ability to communicate. *See Texas v. Johnson,* 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969) (black armbands); *O'Brien,* 391 U.S. 367 (draft card burning). This Court's decision in *R.A.V.* is the latest chapter in this chronicle of expressive conduct cases, holding that

cross burning in certain situations was conduct sufficiently imbued with expressive qualities to merit First Amendment protection.

Yet, this Court in *R.A.V.* also emphasized the distinction between regulations aimed at conduct that is only marginally or incidentally "expressive" and regulations that single out the expressive elements of certain conduct for punishment.[9] Because the St. Paul statute prohibited *expressive* conduct based on its *content*, the Court found it offended First Amendment principles.[10] In so holding, this Court did *not* extend First Amendment protections to all conduct that is arguably "expressive." In fact, the Court expressly guarded its holding from such an interpretation:

> [S]exually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination . . . *where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulations merely because they express a discriminatory idea or philosophy.*

Id. at 2546-47 (emphasis added). This Court did not find that the statute in *R.A.V.* violated the First Amendment because it prohibited discrimination; indeed, the Court recognized that acts of discrimination are not protected expression. Rather, the Court found that the statute's *selection* of certain types of discriminatory *expression* violated the First Amendment.[11]

---

[9]The St. Paul statute provided:

> "Whoever places on public or private property a symbol, object, appellation, characterization or grafliti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor."

R.A.V., 112 S. Ct. at 2541 (*quoting* Minn. Legis. Code § 292.02 (1990)).

[10]Thus, the Court stated:

> The government may not regulate [conduct] based on hostility — or favoritism — towards the underlying message expressed.

Id. at 2545.

[11]It is important to note that the defendant in *R.A.V.* was convicted pursuant to several statutes, but challenged only the "fighting words" conviction. The defendant in *R.A.V.* did not challenge his conviction

This language in the *R.A.V.* opinion highlights two key differences between the statute at issue in *R.A.V.* and that in *Mitchell*. First, the Wisconsin statute deters criminal conduct when it is inflicted in a discriminatory or bias-motivated fashion. It does not prohibit speech, or expressive conduct as such, in any way. Second, the statute is content neutral. It does not selectively regulate conduct which expresses certain disfavored topics as did the St. Paul ordinance. Thus, "there is no reasonable possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2540.

For these reasons, *R.A.V.* is simply inapplicable to *Mitchell*. Indeed, the *R.A.V.* Court expressly qualified its holding by stating that individuals who discriminate cannot justify their activity with the First Amendment merely because their actions might include a discriminatory idea or philosophy. *Id.* at 2546-47. Citing to federal statutes that prohibit discrimination, this Court clearly rejected any attempt to bootstrap an illegal activity such as discrimination into the First Amendment's sphere of protected activity. *Id.* at 2546.

C. THIS COURT SHOULD REVIEW *MITCHELL* BECAUSE IT CONFLICTS WITH OTHER STATE COURT DECISIONS.

Recently, the Oregon Supreme Court held that criminal enhancement statutes for hate crimes were constitutional. *Oregon v. Plowman*, ____ P.2d ____, 314 Or. 157, 1992 WL 207677 (Or. Aug. 27, 1992). *Plowman* involved a statute that criminalized " 'intentionally, knowingly or recklessly [causing] physical injury to another because of [the] perception of that person's race, color, religion, national origin or sexual orientation.' " *Id.* at *1 (quoting Oregon Revised Statute ("O.R.S.") 166.165(1)(a)(A)).[12] The defendant in *Plowman* argued, *inter alia*, that his conviction under the statute " 'must necessarily be proved by the

under the Minnesota statute punishing racially motivated assaults, Minnesota Statute § 609.2231(4). *R.A.V.*, 112 S. Ct. at 2541 n.2.

[12]While O.R.S. 166.165(1)(a)(A) "creates and defines the crime of intimidation in the first degree," *id.* at *1, the defendant challenged it as a statutory enhancement. *Id.* at *3. The reasoning behind the challenge apparently rested on the fact that intimidation in the first degree is a Class C felony, while assault in the fourth degree — the basis of defendant's other conviction — is a Class A misdemeanor. *Id.* Thus,

content of his speech,' " *id.* at *3, and therefore violated the First Amendment.

The Oregon Supreme Court rejected this argument, holding that the statute regulates *only* conduct and thus is consistent with the First Amendment. The court refused to apply *R.A.V.*, holding:

> The [*R.A.V.*] Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct . . . .
>
> [The Oregon Statute] is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here.

Id. at *6.

The *Plowman* court found the regulation did not necessarily impinge upon speech; a multitude of evidentiary showings not involving speech could establish the intent to discriminate. *Id.* Further, the *Plowman* court found that any burden on speech created by the fact that speech *might* be used to prove a violation of O.R.S. 166.165 was *de minimis* and no greater than the burden on speech presented by other crimes, such as attempted murder, where a defendant's intent might be proven by evidence of his spoken or written statements. *Id.*[13]

Because *Mitchell* conflicts with the well-reasoned opinion of the Oregon Supreme Court in *Plowman*, this Court should grant certiorari and resolve the conflict.

D. THE APPLICABLE FIRST AMENDMENT STANDARD, IF ONE IS TO BE APPLIED, IS THE *O'BRIEN* TEST, AND THE WISCONSIN STATUTE IS VALID UNDER THIS TEST.

Even assuming that some level of First Amendment scrutiny applies to criminal conduct aimed at particular classes of people, the statute at issue here survives such scrutiny. As a regulation

application of O.R.S. 166.165(1)(a)(A) acted as a *de facto* enhancement of the punishment the defendant would otherwise have received.

[13]Similarly, an appellate court in Florida has refused to apply First Amendment scrutiny to that state's hate crime statute. *See Dobbins v. Florida*, No. 91-1953, 1992 WL 235338 (Fla. Dist. Ct. App. Sept. 24, 1992)

aimed at conduct that only marginally affects expressive activity, a criminal enhancement for hate crimes is valid if it meets the test set forth in *O'Brien,* 391 U.S. 367. The *O'Brien* test validates such a regulation if: (1) it is within the constitutional power of the state; (2) it furthers an important government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Id.* at 377.

First, the power of the State of Wisconsin to criminalize violent behavior is clear. The legislature has the power to pass laws that are reasonably necessary to promote the public health, safety and morals. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). "There is no question that the proscription of force or [the] threat of force is within the government's powers." *Gilbert*, 813 F.2d at 1531.

In addition, hate crime legislation, such as the Wisconsin statute, furthers an important state interest. As noted in Section III.A., *supra*, hate crimes pose a serious threat to the health and stability of our society. State legislatures such as Wisconsin's have reacted by enacting laws aimed at curbing discriminatory violence. These laws work to prevent the escalating level of hate violence that often accompanies a single incident of bias-motivated violence.

The third prong of the *O'Brien* test is also satisfied by the Wisconsin statute. The purpose of the statute is to address the phenomenon of hate crimes. It does not prohibit racial animus or its expression, but only the manifestation of that hatred in an act such as an assault or battery.

Finally, the incidental restriction on expression, if any, caused by the Wisconsin statute is no greater than is essential to eliminate discriminatory conduct. The purpose of the Wisconsin statute is to prevent discrimination, and it does so in the most direct manner possible by prohibiting the act of discrimination itself. No other means could more directly serve this end.

Thus, under the four-prong *O'Brien* test, the Wisconsin statute does not violate the First Amendment.

IV.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the Wisconsin Supreme Court and give careful consideration to the issues raised by this case.

DATED: November 23, 1992

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

No. 92-515

In The

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*

v.

TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AMERICAN CITIZENS FOR JUSTICE, THE ASIAN LAW ALLIANCE, CHINESE FOR AFFIRMATIVE ACTION, THE CHINESE AMERICAN CITIZENS ALLIANCE, THE JAPANESE AMERICAN CITIZENS LEAGUE, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the National Asian Pacific American Legal Consortium, American Citizens for Justice, the Asian Law Alliance, Chinese for Affirmative Action, the Chinese American Citizens Alliance, the Japanese

American Citizens League, and the National Asian Pacific American Bar Association submit this brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for both parties have consented to the submission of this brief; letters of consent have been filed with the Clerk of the Court.

The *amici curiae* are organizations dedicated to the protection of civil rights for the Asian and Pacific Islander communities in the United States. All *amici* have advocated for the passage of hate crime legislation, and are active members of the National Network Against Anti-Asian Violence, a coalition of organizations that monitor and respond to incidents of hate violence throughout the country.

The National Asian Pacific American Legal Consortium (NAPALC) is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander populations: the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles).

Founded in 1974, the Asian American Legal Defense and Education Fund is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy, and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees.

The Asian Law Caucus, Inc. is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian and Pacific Islander communities. Since 1972, it has provided free and low-cost

multilingual legal services, community education, and general advocacy in the areas of immigration, housing, employment and labor, and civil rights, including discriminatory hate violence. In recognition of the growing problem of anti-Asian violence, the Hate Violence Project was created to develop and implement a comprehensive program to assist Asian victims and to reduce the incidence of hate violence through legal assistance, community education, public policy, and advocacy.

The Asian Pacific American Legal Center of Southern California is a nonprofit legal organization dedicated to serving the Asian communities through direct services, community education, leadership development, and advocacy. Founded in 1983, it provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, interethnic relations, dispute resolution, and civil rights advocacy.

One of the main goals of NAPALC has been to promote racial harmony and to eradicate ethnic and racial violence towards Asian communities. All three organizations comprising NAPALC have extensive knowledge and experience dealing with the issue of hate violence, particularly as it pertains to Asians.

American Citizens for Justice, Inc. (ACJ), was created in 1983 as a coalition of Asian Pacific Americans and other concerned individuals in the Detroit, Michigan and Midwest areas to address anti-Asian violence. The Asian American Center for Justice, the professionally staffed office of ACJ, provides services in legal consultation and education, monitoring anti-Asian violence, advocacy, and community education. ACJ has advocated for the constitutionality of ethnic intimidation statutes in the State of Michigan and throughout the country.

The Asian Law Alliance of Santa Clara County (ALA) is a nonprofit legal services agency serving the Asian and

Pacific Islander communities, particularly low-income and limited-English-speaking refugees and immigrants since 1977. ALA offers free and low-cost legal representation, preventive community education, advocacy, and outreach in a variety of Asian languages. Its programs prioritize issues related to government benefits, immigration, housing, family law/ domestic violence, and civil rights, including hate crimes.

Founded in 1969, Chinese for Affirmative Action (CAA) is a voluntary membership-supported organization dedicated to promote equality and justice for Asian Americans. CAA was instrumental in the 1987 formation of the Asian American Advisory Committee to the California Attorney General, to address the rising tide of anti-Asian hostility in California, as well as other criminal justice problems in the Asian and Pacific Islander communities. The organization has rendered assistance to individuals who have been victims of racial hatred and discrimination, and, at the request of Asian Americans in diverse neighborhoods, has worked with individuals and public officials to reduce the level of intergroup tension.

The Chinese American Citizens Alliance (CACA) is the nation's oldest Asian American civil rights organization, established since 1895 to uphold equal rights for Chinese Americans. As a national membership-supported nonpartisan organization, CACA has participated in various challenges to legal actions that have impacted the Chinese American and Asian American community. CACA has consistently advocated for the passage of various hate crime laws and provided on-going hate crime awareness programs for the Chinese American community.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Established as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in various legal actions which have challenged racial prejudice and

discrimination against Japanese Americans and other Asian Americans. JACL has advocated for, and supported, passage of various hate crime statutes, and monitors incidents of discriminatory hate violence.

The National Asian Pacific American Bar Association (NAPABA) is a nationwide, nonprofit, nonpartisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 2500 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. Since its inception, stemming the rising tide of racial violence, particularly anti-Asian violence, has been one of NAPABA's top priorities. It has produced education materials on racial violence, and its members have testified on behalf of hate crime legislation and have been available as a resource to victims, families of victims, and communities affected by incidents of hate crimes.

This case, and a similar case on petition for a writ of certiorari, *Ohio v. Wyant*, No. 92-568, raise issues of significant concern to *amici curiae* and the individuals they represent.* While *amici* are vigorous defenders of civil liberties and the freedom of speech, *amici* believe that legislative efforts such as the Wisconsin and Ohio enhancement statutes are necessary in the fight to deter racial violence. Violent threats and acts that intimidate or interfere with another person's free exercise or enjoyment of rights secured under the Constitution or laws of the United States or of the individual states because of the victim's membership in a protected class are simply not protected speech.

**Amici curiae* were unable to submit a brief in support of the petition for a writ of certiorari in *Ohio v. Wyant*, No. 92-568, and therefore request that the Court consider this brief in support of Petitioner, the State of Ohio, and consolidate the *Wyant* case with the instant case. *Amici* believe that both cases involve similar hate crimes enhancement statutes and both involve erroneous interpretations of state law and of the First Amendment.

INTRODUCTION

Discriminatory violence -- violent threats and acts perpetrated against certain protected groups in society -- has been occurring with increasing frequency and severity throughout the country, causing devastating effects on victims, as well as society as a whole. Anti-Asian violence in particular has become a widespread and well recognized problem. *See* U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* 22 (1992).

Because of the invidious nature of hate crimes, numerous state legislatures have enacted laws that protect targeted groups such as racial minorities, including Asians and Pacific Islanders. Many states have adopted "enhancement" statutes that authorize the imposition of more severe sentences on criminals whose crimes were committed because of discriminatory intent. In 1992, the United States House of Representatives passed a similar statute aimed at addressing the problem on a federal level. H.R. 4797, 102d Cong., 2d Sess. (1992).

However, because of the uncertainty regarding the applicability of this Court's recent decision in *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538 (1992), to these types of statutes, legislators have become hesitant about introducing new legislation, and law enforcement officials appear to be wary about enforcing existing laws. Granting the petition for a writ of certiorari in the instant case, as well as in a companion case, *Ohio v. Wyant*, No. 92-568, would give this Court the opportunity to provide guidance to legislators and law enforcement officials throughout the country.

Moreover, several state courts have upheld, or are currently reviewing, on First Amendment grounds hate crime penalty enhancement statutes similar to the Ohio and Wisconsin statutes challenged in these cases. If the Court grants the petitions for writs of certiorari, it will have an opportunity to resolve a conflict among the state courts regarding the constitutionality of hate crime enhancement statutes.

ARGUMENT

I. DISCRIMINATORY VIOLENCE IS A SERIOUS AND PERVASIVE NATIONAL PROBLEM

Hate violence directed against victims because of their immutable characteristics is a particularly egregious violation of their civil rights. Violence perpetrated against a person because of membership in a vulnerable group not only affects the victim, but traumatizes the community of which the victim is a member. *See State v. Plowman,* No. S38328 (Or. Aug. 27, 1992); *State v. Beebe,* 67 Or. App. 738, 741, 680 P.2d 11, 13 (1984); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 Mich. L. Rev. 2320, 2335-41 (1989); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 Harv. C.R.-C.L. L. Rev. 133, 135-36 (1982).

Acts of discriminatory violence, including acts of anti-Asian violence, are on the rise. In Los Angeles County, for example, from 1989 to 1990, there was a 146% increase in the total number of hate crimes (550 incidents), and a 65% increase in racially based hate crimes (275 incidents). Moreover, there was also an increase of 257% to 49 incidents, or 17.8% of the total, which were directed at Asians. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1990,* at Summary, 2, 7 (1991). From 1990 to 1991, there was a 27% increase in the total number of racially discriminatory hate crimes and a 22% increase in the total number of overall hate crimes, the highest number of such acts ever recorded. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1991,* at 1 (1992). Out of the total of 351 racially related hate crimes, fifty-four, or 15.1%, were directed at Asian Pacific Americans. *Id.* at 1-2. Nationwide, the Department of Justice reported an increase of 62% in hate crimes perpetrated against Asians within a one year period. Yamauchi, *For Asian Americans, U.S. Climate of 90's is More Hostile*, The

Monitor, May 1990, at 13.

Hate violence against Asian Pacific Americans and other protected groups has run the gamut from racial slurs and graffiti to beatings, shootings, and killings. Recently, for example, on August 21, 1992, a nineteen-year-old Vietnamese student was brutally beaten to death in Coral Springs, Florida. The pre-medical student attended a surprise party with his friends and was taunted with racially derogatory remarks about his Asian ancestry. A gang of fifteen young men chased him down like a "hunted deer" and beat him to death. *Bias-Incited Beating Death of a Vietnamese Stuns a Florida Town*, N.Y. Times, Aug. 23, 1992.

In fact, the viciousness and severity of hate violence incidents has been growing. A recent article revealed that scientists have found that hate crimes are "far more lethal than other kinds of attacks, resulting in the hospitalization of their victims four times more often than is true for other assaults. . . . Half [of the bias incidents] involved assaults. Of these, the victims were injured in 74 percent of the cases; the national average for injury to an assault victim is 29 percent. More telling, at least one victim required hospitalization in 30 percent of the prejudice-based assaults, while for other assaults the average rate of injuries that severe is 7 percent." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, N.Y. Times, July 10, 1990, § C, at 1, col. 1.

II. PENALTY ENHANCEMENT LAWS ARE NECESSARY TO PREVENT AND PUNISH DISCRIMINATORY VIOLENCE

As a response to the growing and widespread problem of discriminatory violence, state and local governments across the country have enacted statutes that monitor hate crimes and prohibit specific acts of violence, intimidation, and coercion. *See* Anti Defamation League of B'nai B'rith, *Hate Crimes Statutes: A 1991 Report*, at 1-2, 22 (1991); Nat'l Inst.

Against Prejudice & Violence, *Striking Back at Bigotry: Remedies Under Federal and State Laws for Violence Motivated By Racial, Religious, and Ethnic Prejudice* 61-65 (1986 & Supp. 1988). The United States Congress has also recognized the gravity of the problem and has passed the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C.A. § 534 (1992)), to monitor and collect data on hate crimes at the national level.

Laws that specifically address the problem of discriminatory violence communicate to individuals who would commit acts of violence that the local community or state does not tolerate such acts. These laws also encourage the police to act with particular dispatch in handling discriminatory hate crimes. As the United States Civil Rights Commission has noted: "Effective police responses to incidents of racial and religious violence are necessary to keep such incidents from spreading. If the police fail to respond, or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret the police activity as official sympathy or even sanction." U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* 17-18 (1990).

III. PENALTY ENHANCEMENT STATUTES APPLYING TO DISCRIMINATORY VIOLENCE ARE CONSTITUTIONAL

This Court has long held that conduct lacking expressive elements does not enjoy constitutional protection. *Spence v. Washington*, 418 U.S. 405, 409 (1974). Most clearly, conduct that rises to the level of violence against person or property is exempt from constitutional shelter: "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). And, "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection."

Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

Moreover, this Court has held that judges may consider and use an offender's motivation in committing a crime as a basis for increasing the sentencing for a crime. *See Dawson v. Delaware,* 112 S. Ct. 1093 (1992); *Barclay v. Florida,* 483 U.S. 939 (1983). Penalty enhancement statutes provide more consistency in sentencing because discriminatory intent must be proved and judges are instructed as to how much weight to give such intent.

The Wisconsin law at issue is a criminal enhancement statute. Wis. Stat. Ann. § 939.645 (West Supp. 1992). It augments the punishment of predicate crimes defined in other laws. The statute is also an antidiscrimination law. Like other antidiscrimination laws, it expresses the legislative intent that certain groups in society suffer from discrimination and require special protection; therefore, discriminatory acts against individuals who are members -- or perceived to be members -- of those groups are unacceptable and must be punished accordingly.

The language of the Wisconsin statute parallels the language found in both civil and criminal antidiscrimination laws. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1988). Individuals who are not hired *because of* their race, individuals who receive less pay *because of* the color of their skin, individuals who are not promoted *because of* their religion, individuals who are harassed *because of* their sex, individuals who are discharged *because of* their national origin -- all the individuals in these situations and in numerous permutations are protected by Title VII from illegal discrimination. *See also* 42 U.S.C. §§ 1981, 1982.

In the criminal context, the federal criminal civil rights

law codified at 18 U.S.C. Section 242 prohibits violent acts committed against another person "by reason of his color, or race." 18 U.S.C. § 242 (1988). The law is derived from the Civil Rights Act of 1866, whose purpose was "to protect all persons in the United States in their civil rights and furnish means of vindication. In origin it was an antidiscrimination measure (as its language indicated), framed to protect Negroes in their newly won rights." *Screws v. United States,* 325 U.S. 91, 98-99 (1945).

The Wisconsin statute, section 939.645, reflects the state legislature's determination that violent acts committed with discriminatory intent are more reprehensible than the same acts committed without discriminatory intent, just as firing someone from a job or denying them a loan or an apartment in which to live is more reprehensible when done for discriminatory reasons. The argument that penalty enhancement statutes such as section 939.645 punish biased thought and motive thus misses the basic point of hate crimes legislation. Hate crime statutes do not punish a perpetrator's thoughts; such statutes punish the discrimination committed against another person through a violent act.

IV. THE WISCONSIN SUPREME COURT ERRED BY HOLDING THAT SECTION 939.645 IS UNCONSTITUTIONAL, AND IS IN THE MINORITY OF STATE COURTS ADDRESSING SIMILAR STATUTES

Various courts have recognized the special nature of discriminatory acts of violence and rejected constitutional challenges to hate crimes legislation. For example, in *State v. Beebe,* 670 Or. App. 738, 680 P.2d 11 (1984), an Oregon appellate court upheld the constitutionality of a statute that enhanced penalties for racial violence. Noting the special problem of increased societal dangers resulting from discriminatory violence, the court stated: "Such confrontations therefore readily -- and commonly do -- escalate from

individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *Id.* at 13. Holding that the statute was constitutional because it regulated conduct and not speech, the court stated: "The legislature may legitimately determine that the danger to society from assaultive conduct directed toward and individual because his race, religion or national origin is greater than behavior under other circumstances." *Id.*

More recently, in *State v. Plowman,* No. S38328, slip. op. at 10-11 (Or. Aug. 27, 1992), the Oregon Supreme Court upheld a challenge to the state's intimidation statute, stating:

> In enacting the intimidation statute, the legislature determined that . . . causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes -- because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member -- invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.

The court went on to reject the argument that the Oregon statute offended the First Amendment by punishing a defendant's opinion: "Rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that the victim belongs to a particular group. . . . Put differently: One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group." *Id.* at 10; *see also Kinser v.*

State, 591 A.2d 894 (Md. 1991); *State v. Hendrix,* 107 Or. App. 734, 813 P.2d 1115 (1991); *People v. Grupe,* 141 Misc. 2d 6, 532 N.Y.S.2d 815 (1988).

However, two state supreme courts have recently struck down penalty enhancement statutes as unconstitutional, arguing that the statutes punished "motive" and regulated "thought." In the instant case, the Wisconsin Supreme Court overturned the state's antidiscrimination criminal enhancement statute on the grounds that it "violates the First Amendment directly by punishing what the Legislature has deemed to be offensive thought and indirectly by chilling free speech." *State v. Mitchell,* 169 Wis. 153, 485 N.W.2d 807, 811 (1992). Establishing a distinction between the defendant's criminal act and the defendant's motives for committing the act, the *Mitchell* court majority found that the statute punished the defendant's biased motives through the sentence enhancement and thus unnecessarily infringed upon his First Amendment rights.

Relying on *Mitchell,* the Ohio Supreme Court held that the Ohio enhancement statute also criminalized motive and thought in violation of the First Amendment. *State v. Wyant,* 1992 Ohio LEXIS 1837. The court stated: "Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?" *Id.* at *23.

In both cases, the courts wrongly interpreted the statutes by attempting to divorce the physical act of violence from the motivation of the actor. *Mitchell, supra,* 485 N.W.2d at 817; *Wyant, supra,* 1992 Ohio LEXIS 1837 at *18. Focusing on *motive* rather than on the *intent* that attaches to the act of violence completely misdirects the inquiry in evaluating hate

crimes legislation. As in other crimes, the actor's motive per se is not relevant in an act of discriminatory violence. A person may attack a member of a racial minority group for any number of reasons: intolerance and xenophobia toward people who are different from oneself, vengeance arising from the effects of economic competition, latent hostility rooted in past military conflict, or simply, overt hatred of another race. However, it is the *intent to commit a violent act against a member of a protected group* that must be examined, not the defendant's motive; in other words, criminal liability rests not on motivation but on proof that the defendant has committed an act of violence *because of* the victim's membership in a protected class.

Correctly focusing on the discriminatory intent of the defendant demonstrates that there is no real difference between a hate crimes statute and another antidiscrimination law that punishes actions based on discriminatory intent. Employment laws punish acts of employment discrimination; housing laws punish acts of housing discrimination; educational laws punish acts of educational discrimination. Hate crimes statutes do no more and no less: they punish acts of criminal discrimination -- discriminatory violence.

V. THIS COURT SHOULD RESOLVE THE CONFUSION IN THE STATE COURTS REGARDING THE CONSTITUTIONALITY OF HATE CRIMES STATUTES

As noted earlier, there are conflicting decisions among the state high courts regarding the constitutionality of their hate crimes statutes. In the wake of this Court's decision last term in *R.A.V. v. City of St. Paul*, challenges to state hate crimes statutes are now pending in courts throughout the country. Several state supreme courts are currently reviewing the constitutionality of hate crimes statutes. *See, e.g., State v. Stalder*, 599 So. 2d 1280 (Fla. 1992) (reviewing trial court decision striking down Florida's hate crimes enhancement

statute as unconstitutional); *State v. LaDue*, No. 91-313 (Vt. 1992) (reviewing district court decision upholding Vermont's hate crime enhancement statute). Other challenges are making their way up to the state supreme courts and are pending in trial and lower appellate courts. In California, for example, there are three cases that will be decided by the Court of Appeal in the near future. *People v. Joshua*, No. H008944 (Cal. Ct. App. 6th Dist. 1992) (challenging California misdemeanor penalty enhancement statute, Cal. Penal Code § 422.7); *People v. Mearra S.*, No. A055072 (Cal. Ct. App. 1st Dist. 1992) (challenging California substantive hate crimes statute, Cal. Penal Code § 422.6, and penalty enhancement statute, Cal. Penal Code § 422.7); *Schwartz v. Superior Court*, No. A059514 (Cal. Ct. App. 1st Dist. 1992) (challenging misdemeanor and felony penalty enhancement statutes, Cal. Penal Code §§ 422.7, 422.75).

By granting the petition for writ of certiorari in *Mitchell* as well as in *Wyant*, this Court has the opportunity to correct the erroneous decisions of the state courts and to clarify the conflicting decisions regarding hate crimes statutes. Statutes such as Wisconsin's section 939.645 are constitutional and must be upheld.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in the instant case, as well as in the case of *Ohio v. Wyant*, No. 92-568, to consolidate the cases and to reverse the state supreme court decisions holding hate crime penalty enhancement statutes to be unconstitutional.

Respectfully submitted,

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Dated: November 23, 1992

Supreme Court U.S.
FILED
1992
NOV 23 1992
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICI CURIAE* OF THE CALIFORNIA ASSOCIATION OF HUMAN RIGHTS ORGANIZATIONS, CENTER FOR DEMOCRATIC RENEWAL, COMMUNITY UNITED AGAINST VIOLENCE, HUMAN RIGHTS/FAIR HOUSING COMMISSION OF THE CITY AND COUNTY OF SACRAMENTO (CALIFORNIA), INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES, LOS ANGELES COUNTY HUMAN RELATIONS COMMISSION, NATIONAL ASSOCIATION OF HUMAN RIGHTS WORKERS, NEW YORK CITY COMMISSION ON HUMAN RIGHTS, NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, NORTH CAROLINIANS AGAINST RACIST AND RELIGIOUS VIOLENCE AND SANTA CLARA COUNTY (CALIFORNIA) HUMAN RELATIONS COMMISSION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Barclay v. Florida,
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Barnes v. Glen Theatre, Inc.,
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Boos v. Barry,
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408 U.S. 104 (1972) 6

Milk Wagon Drivers U. v. Meadowmoor Dairies,
312 U.S. 287 (1941) 5

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 5

R.A.V. v. St. Paul,
___ U.S. ___, 112 S. Ct. 2538
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Renton v. Playtime Theaters, Inc.,
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Roberts v. United States Jaycees,
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Spence v. Washington,
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State of Wisconsin v. Mitchell,
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United States v. O'Brien,
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Watts v. United States,
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Hate Crimes Sentencing Enhancement
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2d Sess. (1992) 3

OTHER REFERENCES

Anti-Defamation League of B'nai B'rith,
ADL Law Report, ADL in the Courts: Litigation Docket 1991, Fall 1991 3

Black and White: A Newsweek Poll, Newsweek, March 7, 1988 at 23 15

Boston Police Department, *Community Disorders Unit Incident Breakdown 1978 to 1991* in Boston Police Dept., 1991 Yearly Report, February 4, 1992 13

D. deLeon, Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, November 15, 1992 ... 14

B. Flynn, Telephone Interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Units (November 12, 1992) 13

J. Garofalo, *Bias And Non-Bias Crimes In New York City: Preliminary Findings*, Unpublished Paper (1990) 11, 18

D. Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism*, N.Y. Times, June 29, 1990 11

Governor's Task Force on Bias-Related Violence, Final Report (1988) 13, 15

J. Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991 18

B. Levin, *Bias Crimes: A Theoretical And Practical Overview,* forthcoming 4 Stan. L. & Pol'y Rev. 9, 10, 18

J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry And Bloodshed*, forthcoming Spring 1993 ..... 9, 10, 11, 13, 17

Maryland State Police Criminal Intelligence Division: *Hate/Bias Incident Assessment* (1991) 11

J. McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts (1983-1987)* (November 1989) (Paper presented to the American Society of Criminology on file with the author) 12, 15

New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992) 14

National Institute Against Prejudice & Violence, *The Ethnoviolence Project*, Institute Report No. 1 (1986) 12, 16

Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987 17

L. Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992 14

Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990 16

Southern Poverty Law Center, *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's,* Special Report (1987) 16

J. P. Stevens, Associate Justice, United States Supreme Court, Remarks at Yale Law School, October 27, 1992 19

L. Tribe, *American Constitutional Law* (2d ed. 1988) § 12-7 6

U.S. Department of Justice, Report to the Nation on Crime and Justice, 2nd Edition, March 1988 18

C. Wexler and G. T. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986) 12, 13

V. N. Lee, *Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R. - C.L. L. Rev. (1990) 12

Wilson & Kelling, *Broken Windows,* Atlantic Monthly, March 1982 17

INTEREST OF *AMICI CURIAE*

The California Association of Human Rights Organizations, the Center for Democratic Renewal, Community United Against Violence, the Human Rights/Fair Housing Commission of the City and County of Sacramento, the International Association of Official Human Rights Agencies, the Los Angeles County Commission on Human Relations, the New York City Commission on Human Rights, the National Association of Human Rights Workers, North Carolinians Against Racist and Religious Violence, and the Santa Clara County Human Relations Commission, with the consent of both litigants, appear as *amici curiae* so as to provide the Court, in addition to compelling legal analysis, material and overwhelmingly persuasive information justifying the special regulation of bias crimes. *Amici* constitute a variety of government agencies and civic organizations which provide legal, educational and other services regarding bias crimes and related matters. *Amici* have a substantial interest in demonstrating the constitutionality of bias crime statutes because of their central role in eradicating acts of bias violence. Individual descriptions of the agencies and organizations are set forth in the accompanying Appendix at pp. A6 - A9.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Wisconsin Criminal Code provides for enhanced punishment when the State proves that a convicted criminal "[i]ntentionally selects the person against whom the crime . . . is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . . " Wis. Stat. § 939.645(1)(b).

The Wisconsin Supreme Court has held that the Wisconsin statute violates the First Amendment because it punishes "what the Legislature has deemed to be offensive thought. . . ." *State of Wisconsin v. Mitchell,* 169 Wis. 2d 153, 163 (1992). As argued herein, however, the statute represents a legitimate exercise of the State's police power to protect the health, safety and welfare of its citizens and does not, in any way, infringe upon First Amendment rights. First, the proscription of pernicious discriminatory or violent conduct, which the State has a legitimate interest in eradicating, does not in any way implicate the First Amendment. Second, even if protected free expression were somehow touched by the Wisconsin statute, there are compelling, content-neutral justifications for authorizing enhanced penalties for bias offenses. These justifications override any concern that free speech might be inhibited. Bias crimes are a criminologically distinct category of offenses that create special and quantifiable harms to society. These unique harms justify

enhanced penalties for offenders.[1/] As shown herein, criminologists have concluded that bias crimes are particularly disruptive to individuals and communities, require a greater application of police resources, and are most often committed to deter whole groups of people from exercising rights relating to housing, employment, freedom of association and public access. Conventional criminal statutes do not address the unique evils that bias crimes pose.

II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment

The Wisconsin statute does not criminalize beliefs. Rather, it regulates a form of discriminatory conduct -- the intentional selection of a victim based on his or her status. As such, the Wisconsin law falls squarely within the category of regulation, expressly approved by this Court, that addresses the "unique evils" caused by invidious discrimination. As the Court held in *Roberts v. United States Jaycees,* 468 U.S. 609 (1984):

> [A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct

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1/ Forty-six states have enacted statutes that target bias crimes. Anti-Defamation League of B'nai B'rith, *ADL Law Report, ADL in the Courts: Litigation Docket 1991,* Fall 1991. The federal Hate Crimes Statistics Act of 1990, Pub. L. 101-275, mandates data collection regarding bias crimes. *See also,* The Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992).

> may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to *no constitutional protection*.

Id. at 628 (emphasis added).[2/]

Criminal activity motivated by prejudice can be no more protected under the First Amendment than is discrimination in the areas of housing, employment, education, freedom of association and public access. The Wisconsin statute simply and narrowly targets such criminal activity.

2/ The *Roberts* Court assumed that the relevant state statute, which forbade discrimination in access to public facilities on the basis of race, color, creed, religion, disability, national origin or sex, met the test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), *viz.*, that the regulation furthers an important governmental interest, that the interest is unrelated to the suppression of free expression and that the incidental restriction on First Amendment freedoms is no greater than necessary to further the government interest. *Id.* at 377. Even were the Wisconsin statute to focus on the expressive content of a crime rather than on the method by which the criminal selects a victim, it would still pass constitutional muster. As demonstrated herein, the "secondary effects" of bias crimes provide an independent basis for enforcing the constitutionality of such penalty enhancement provisions. *See* § V *infra*.

III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment

"The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Because violent acts and threats run counter to the purposes of the First Amendment guarantee of freedom of speech this Court has consistently allowed the government to regulate such conduct. "[In] back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind." *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941). The fact that a threat or act of violence has an expressive component does not diminish the government's authority to punish an offender. Violence and threats simply are not afforded constitutional protection. As the Court noted in *Spence v. Washington*, 418 U.S. 405, 409 (1974):

> [I]t is . . . necessary to determine whether [the] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person

engaging in the conduct intends thereby to express an idea."[3/]

It has already been determined that crimes of violence involving status-based discrimination may be punished more severely than otherwise without offending First Amendment principles. In *Barclay v. Florida,* 463 U.S. 939, 949 (1983), this Court ruled that the defendant's racial hatred and desire to start a race war was relevant to the propriety of a capital sentence.

IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence

Aside from the state's interest in eradicating discriminatory or violent conduct against its citizens, the state often has other substantial reasons, unrelated to expression or belief, to regulate conduct which has an expressive element.

In *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 47-48 (1986), this Court ruled that a zoning ordinance that restricted the location of adult movie theaters was

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3/ *See also Watts v. United States,* 394 U.S. 705 (1969) (The government may constitutionally punish bona fide threats against the President provided that it does not make viewpoint based differentiations); *Boos v. Barry,* 485 U.S. 312, 331 (1988) ("[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment," quoting *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972)). As Professor Tribe noted in American Constitutional Law (2d ed. 1988) § 12-7 at 828, n. 18, "[T]he Court . . . has been reluctant to concede that the First Amendment has any relevance whatsoever to political assassination, radical bank robberies, or other violent modes of expression."

constitutional because it "aimed not at the [expressive] content . . . but rather at the secondary effects. . . ." The Court pointed to the ordinance's purpose "to prevent crime . . . and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life. . . ." Similarly, in *Barnes v. Glen Theatre, Inc.,* ___ U.S. ___, 111 S.Ct. 2456 (1991), the Court held that a total ban on nude dancing was constitutional, notwithstanding any free expression interests, because the state has a legitimate interest in protecting public order and morality. Justice Scalia, in a concurring opinion, concluded that general laws regulating conduct and not specifically directed at expression do not violate the First Amendment. *Id.* at 2465.

In *R.A.V. v. St. Paul,* ___ U.S. ___, 112 S.Ct. 2538 (1992), while holding unconstitutional a local ordinance which prohibited the display of certain symbols, the Court nonetheless reasoned that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Indeed, the *R.A.V.* Court expressly approved longstanding precedent allowing the government to make content based prohibitions in three specific instances.

First, the Court recited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 2545. The Court differentiated between permissible content discrimination and impermissible viewpoint discrimination by examining laws which prohibit

threats of violence against the President. 18 U.S.C. § 871.[4/] Second, citing *Renton,* the Court reaffirmed that differential treatment of content based groups is permissible if the disparate treatment is based on the "secondary effects" of the speech and not the expressive content. 112 S.Ct. at 2546. Third, the Court recognized that the states have broad authority to discriminate based on content when "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.[5/]

V. There Are Legitimate, Reasonable And Content-Neutral Justifications For Bias Crime Penalty Enhancement Statutes

States have a compelling interest, wholly unrelated to expressive content, in targeting bias crimes for heightened penalties. As Justice Stevens stated in *R.A.V.*:

> Conduct that creates special risks or causes special harm may be prohibited by special rules. Lighting a fire near an ammunition

4/ The Federal government may constitutionally punish threats against the President because of the potential for significant societal disruption. *Watts v. United States,* 394 U.S. 705, 707 (1969). The government, however, is not allowed to punish threats solely because those threats implicate a particular point of view. *R.A.V.,* 112 S.Ct. at 2546.

5/ This Court consistently has refused to employ the First Amendment to shield unlawful conduct from regulation. *See Arcara v. Cloud Books, Inc.,* 478 U.S. 697 (1986) (upholding a law which gives the state authority to close an adult book store when prostitution takes place at the location); *United States v. O'Brien,* 391 U.S. 367 (1968) (prohibition of draft-card destruction is constitutional, notwithstanding any expressive component).

> dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption, *such threats may be punished more severely. . . .*

Id. at 2561 (emphasis added).

A. Excessive Violence

Bias crimes are more violent than non-bias crimes. Indeed, bias crimes are at least three times more likely to involve criminal assault than non-bias crimes. These assaults are twice as likely to cause injury and four times more likely to result in hospitalization as non-bias assaults.[6/] Unlike crimes based on personal conflict or pecuniary gain, there is little a victim can do to lessen the severity of such an attack. Bias crime victims cannot easily appease an attacker by turning over property or by apologizing for past conduct. The violent purpose behind the crime generally eliminates the opportunity for a victim

6/ *See*, B. Levin, *Bias Crimes: A Theoretical And Practical Overview,* forthcoming 4 Stan. L. & Pol'y Rev. at 3-4 (hereinafter "*Bias Crimes*"), and J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry and Bloodshed* at 15, forthcoming Spring 1993 (hereinafter "*Hate Crimes*"). Copies of these sources have been lodged with the Court and provided to counsel for the litigants. Page references are to the lodged copies.

to lessen his or her injury through any meaningful act of compliance.

B. Random and Irrational Nature

The irrational nature of bias crimes is particularly disruptive and threatening both to victims and to the community. Compared to conventional crimes, bias crimes are far more likely to be committed randomly against victims by complete strangers.[7/] Criminologists have concluded that there is far greater societal disruption from random acts of violence than there is from those violent acts which have some rational cause.[8/] The disruption to society is significant when whole groups of citizens are placed in constant fear of random violence from attackers with whom they have no direct connection.

C. Multiple Offenders

Bias crimes are at least twice as likely to involve multiple offenders acting in concert, often against a single victim. Nationally, approximately 25% of violent crimes are committed by two or more offenders.[9/] In contrast, an analysis of the jurisdictions having the most credible bias crime statistics reveals the disproportionate involvement of multiple offenders.

7/ *Bias Crimes, supra* n. 6 at 4-5; *Hate Crimes, supra* n. 6 at 16.

8/ *Hate Crimes, supra* n. 6 at 17.

9/ *Bias Crimes, supra* n. 6 at 4-5; *Hate Crimes, supra* n. 6 at 21.

In Maryland, 71% of the bias crime cases involved multiple offenders.[10/] The comparable figures for New York City and Boston, respectively, were 75% and 64%.[11/] The Boston study reveals that most attacks involved four or more perpetrators and a lone victim.[12/] Such violent group conduct presents unique dangers because: (1) offenders are empowered by the heightened sense of dominance and exhilaration that results from group action; (2) individual offenders lose a sense of direct accountability for actions that occur at the hands of a group; and (3) the group offers anonymity.[13/] An analysis of lynchings in the first part of this century revealed that "the larger the mob, the more atrocious and savage the lynching and the more likely [it is] to include burning or mutilating the victim."[14/] More recently, many of the most publicized bias homicides, including the 1981 Klan lynching of teenager Michael Donald in Mobile, Alabama, the murder in Bensonhurst, New York of Yusef Hawkins, a young black teenager, and last year's stabbing of a rabbinical student in Brooklyn, involved uncontrolled group attacks on lone victims. Such violence by disorderly crowds frequently results in more severe injuries, greater

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10/ Maryland State Police Criminal Intelligence Division: Hate/Bias Incident Assessment, at 17 (1991).

11/ James Garofalo, *Bias and Non-Bias Crimes In New York City: Preliminary Findings*, at 16 (manuscript, 1990); *Bias Crimes* at 4.

12/ *Hate Crimes* at 22.

13/ Daniel Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism*, N.Y. Times, June 29, 1990, at C5.

14/ *Id.*

community disruption and disproportionate diversion of scarce police resources.

D. Serial Nature

An analysis of Boston Police Department figures confirms that bias victims are often subjected to a series of attacks[15]; a study by the National Institute Against Prejudice and Violence revealed that two-thirds of the victims of intergroup violence were attacked repeatedly.[16] Conventional criminal statutes do not adequately deter bias crimes.[17] Before the passage of Massachusetts' criminal civil rights statute, the Boston Police Department consistently responded to repeat bias crimes committed either against the same victims, by the same perpetrators, or both. The first case prosecuted in the state under this statute involved a group of individuals whose members had been repeatedly arrested for committing criminal acts against the same group of

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15/ Jack McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts (1983-1987)* (November 1989) (hereinafter "*The McDevitt Study*") (Paper presented to the American Society of Criminology at 3. Copies of *The McDevitt Study* have been lodged with the Court and provided to counsel for the litigants.)

16/ National Institute Against Prejudice & Violence, *The Ethnoviolence Project, Institute Report No. 1*, 5 (1986) (hereinafter "*Ethnoviolence Project*").

17/ *See generally*, Chuck Wexler and Gary T. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986) (hereinafter "*Law and Order*"); Virginia N. Lee, *Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R. - C.L. L. Rev. (1990).

minority families.[18] After Boston began widespread enforcement of the statute, repeat incidents dropped significantly and the overall level of reported bias crimes in Boston fell by two-thirds.[19]

E. Risk of Social Disorder

The interchangeability of victims based merely upon perceived status heightens the social disruption associated with bias crimes. The substitutable nature of the victimization places entire classes of people on notice that they face a threat over which they have little meaningful control.[20] The potential for conflict that flows from this characteristic of bias crimes creates particularly explosive situations, where one incident can lead to a series of related acts of random inter-group retaliation. A New York State task force recently concluded that "[a] single incident can be the tragedy of a lifetime to its victim and may be the spark that rends and disrupts an entire community."[21]

Bias-related tensions, particularly those involving race, have consistently sparked this nation's most violent

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18/ Telephone interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Unit (Nov. 12, 1992).

19/ *See generally, Law and Order, supra* n. 17; *Community Disorders Unit Incident Breakdown 1978 to 1991* in Boston Police Dept., 1991 Yearly Report, Feb. 4, 1992.

20/ *Hate Crimes, supra* n. 6 at 20.

21/ Governor's Task Force on Bias-Related Violence, Final Report at E.S. 10 (1988).

and disruptive civil disorders. Ample statistical evidence illustrates how one incident can spark a series of incidents of random retaliation.[22/] According to police, perpetrators commonly refer to the initial incidents as their motivation for committing subsequent offenses. A notable example occurred in the Bronx in January 1992, after two minority youths were beaten, robbed, smeared with white sneaker polish and told it was "their day to be white."[23/] The borough experienced more bias crimes in January than in the previous four months combined. New York City as a whole experienced two and one-half times the number of bias crimes in January than it had in December.[24/] The mayor, additional police and social service personnel were summoned to the area to diffuse tension in the community.[25/]

F. Limits Exercise of Civil Rights

Bias crimes are distinctive because they directly and forcefully interfere with the exercise of civil rights. A recent study of the Boston Police Department's bias crime data shows that the majority of bias offenders committed their crimes merely because an individual was driving, working, passing through or moving into a neighborhood.

22/ *See* Appendix at A3-5.

23/ Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992, at B1.

24/ New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992).

25/ Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, November 15, 1992.

The study found, "The lack of public access to certain neighborhoods in our cities is a truly serious problem."[26/]

There also is a direct connection between bias crimes and interference with housing rights:

> Attempts to deprive minorities of equal access to housing through harassment, intimidation, threats, vandalism, arson and other acts of violence persist and have intensified. This is true twenty years after the enactment of the Federal Fair Housing Act and the extension of the New York State Human Rights Law to non-public housing more than 25 years ago.[27/]

Fewer than one-half of the white respondents in a 1988 Newsweek poll said they preferred to live in a racially mixed neighborhood.[28/] The presence of minorities in ethnically changing neighborhoods frequently results in criminal victimizations. A 1987 study concluded that "[m]inority families are at risk in many communities from hard-core racists who see their all-white

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26/ *The McDevitt Study, supra* n. 15.

27/ Governor's Task Force on Bias-Related Violence, Final Report at 242 (1988).

28/ *Black and White: A Newsweek Poll*, Newsweek, March 7, 1988, at 23.

neighborhoods as the last bastions of segregation."[29/] Justice Blackmun concluded in *R.A.V.*, "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes . . ." 112 S.Ct. at 2561.

G. Effect on Victims

In a study by the National Institute Against Prejudice And Violence, researchers concluded that victims of bias-type attacks suffered 21% more psychological and physiological symptoms than victims of the same crimes that were not bias-related.[30/] Another study by the National Institute's Ethno-Violence Project concluded that "[m]any victims fear for their safety and for their family's safety . . . many of them report changes in their lifestyle -- where they walk, how they answer the phone and the . . . fear can disrupt totally the lives of some victims".[31/]

29/ *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's*, Special Report, Southern Poverty Law Center (1987); Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990, at A1.

30/ National Institute Against Prejudice and Violence, *National Victimization Survey*, 1989.

31/ *Ethnoviolence Project, supra*, n.16.

H. Adverse Effect on Community

Bias crimes diminish the quality of life in the community. Criminologists have found that disorderly or threatening conduct within a community, rather than direct violent victimization, is far more responsible for the fear and anxiety felt by most citizens.[32/] This communal suffering is as relevant as any individual suffering that might occur as a result of these crimes.

I. Cumulative Terroristic Effect

According to the FBI, terrorism is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."[33/] The fact that bias crimes are more likely to involve excessive violence, random and serial attacks, multiple unknown offenders and a high risk of social disorder makes the offense especially threatening to victims and to their immediate community. Accordingly, criminologists regard these offenses as being terroristic.[34/]

32/ Wilson & Kelling, *Broken Windows*, Atlantic Monthly, March 1982 at 29.

33/ Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987, at 14-15.

34/ *Hate Crimes, supra*, n. 6 at 214.

J. Requirement of Additional Resources

Bias crimes require a disproportionate allocation of government resources.[35/] Because of the frequent lack of a direct personal connection between the parties and the lack of tangible evidence, such as stolen property, it is more difficult for police to effect arrests in bias crime cases. Arrest rates for bias crimes are generally less than 25%[36/], even though at least half of them involve direct physical confrontation. [37/] In contrast, the overall arrest rate for violent crimes is about 48%.[38/] These differing arrest rates cannot be attributed simply to a lack of police effort in investigating bias crimes. In New York City, 85% of bias crimes received follow up investigative time of more than a month, while only 2% of non-bias crimes did. New York City police filed 3 or more investigative reports in 93% of the bias cases, but only 7% of the non-bias cases resulted in 3 or more report filings.[39/]

35/ Garofalo, *supra*, n. 11 at 17-18.

36/ *Bias Crimes: supra*, n. 6 at 4.

37/ *Id.* at 3.

38/ U.S. Department of Justice, *Report to the Nation on Crime and Justice,* 2d ed., March 1988, at 69.

39/ When intergroup tensions are ignited, they often require a substantial law enforcement presence to control. After a fatal mixed-race auto accident in Brooklyn in August 1991, 1,500 police officers were needed to contain the resulting riots, which lasted for four days and resulted in 180 arrests. John Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991, at A27.

CONCLUSION

Justice Stevens recently stated, "[n]either a trespass on private property nor an assault against an individual need be characterized as speech in the Constitutional sense."[40/] It has never been supposed that, when a criminal is motivated by an invidious idea or philosophy in carrying out his or her criminal purpose, the motivating idea or philosophy is somehow beyond examination for the purpose of determining an appropriate punishment. *A fortiori,* there can be no such limitation where the effects of the conduct in question are as devastating and as widespread as the effects of bias crimes. For all of the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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40/ *The Freedom of Speech*, remarks of John Paul Stevens, Associate Justice, United States Supreme Court at Yale Law School, October 27, 1992.

APPENDIX

The Relative Frequency Of
Person/Property Attacks
Of Various Bias And
Non Bias Crimes A1

Comparison Of Bias And
Non-Bias Crimes A2

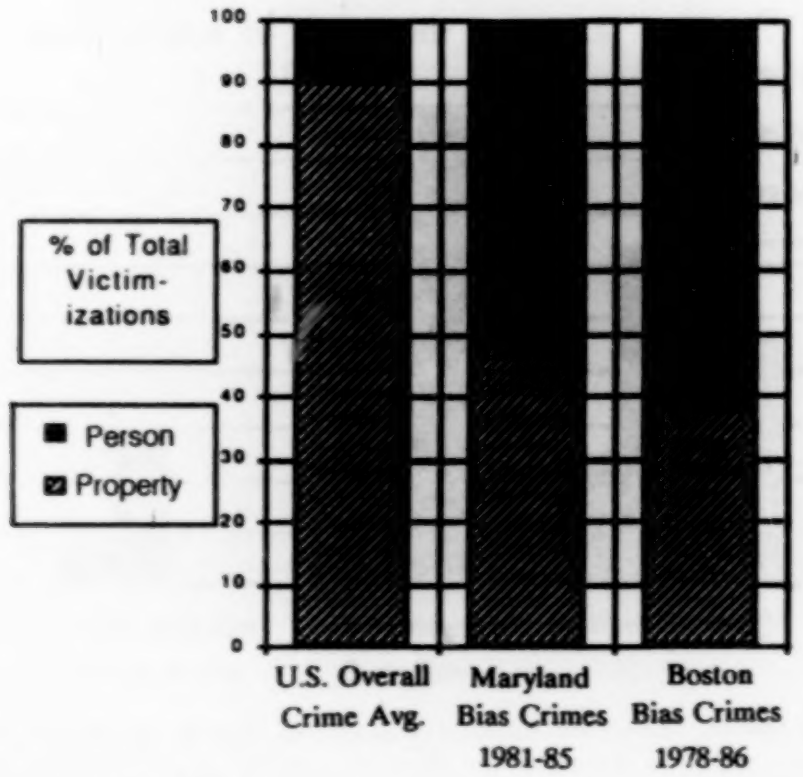
The Impact: A Pattern
Of Attacks A3, A4

The Conflict Generating
Potential Of Bias Crimes:
The Bronx, New York 1991-1992 ..... A5

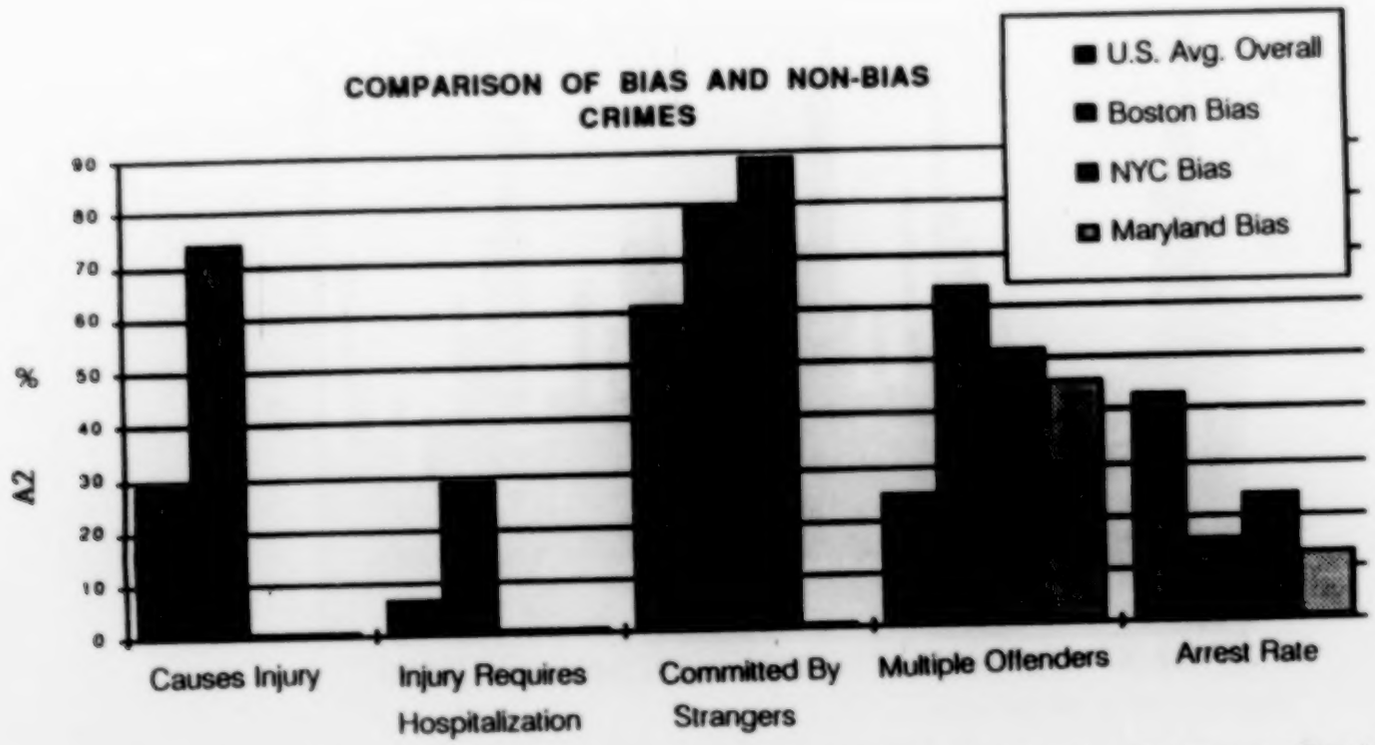
Description Of The *Amici Curiae* A6

A1

The Relative Frequency of Person/Property Attacks of Various Bias and Non Bias Crimes

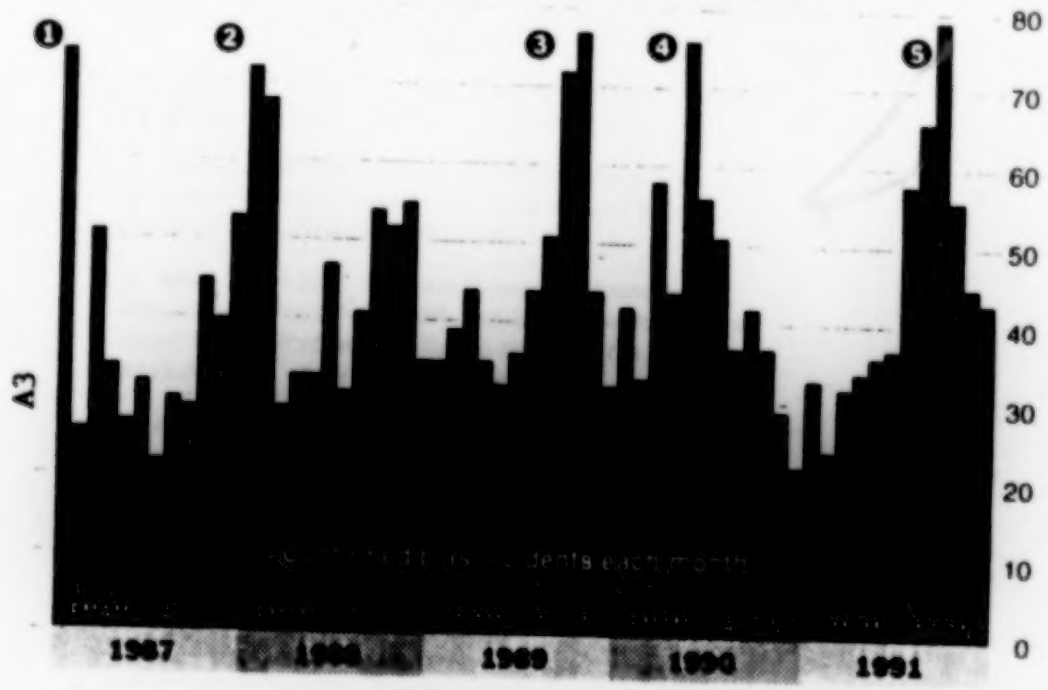


Source: FBI Crime In The United States 1985; Maryland State Police-Criminal Intelligence Division; Boston Police Department-Community Disorders Unit, Incident Breakdown



© 1992 Stanford Law & Policy Review, From B. Levin, Bias Crimes: A Theoretical and Practical Overview. (Forthcoming, 4 Stan. L. & Pol'y Rev. 1993.)

The Impact: A Pattern of Attacks



Source New York City Police Department

Legend on Following Page

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The Impact: A Pattern of Attacks

Reports of bias attacks tend to peak shortly after a widely publicized incident.

1. Dec. 20, 1986 Michael Griffith, a black man, is killed in Howard Beach, Queens, as he is chased onto a highway by a group of white men.

2. Nov. 28, 1987 Tawana Brawley is found in Wappingers Falls, N.Y., with racial slurs written on her torso. Law-enforcement officials later say her report of assault by six white men is a hoax.

A4

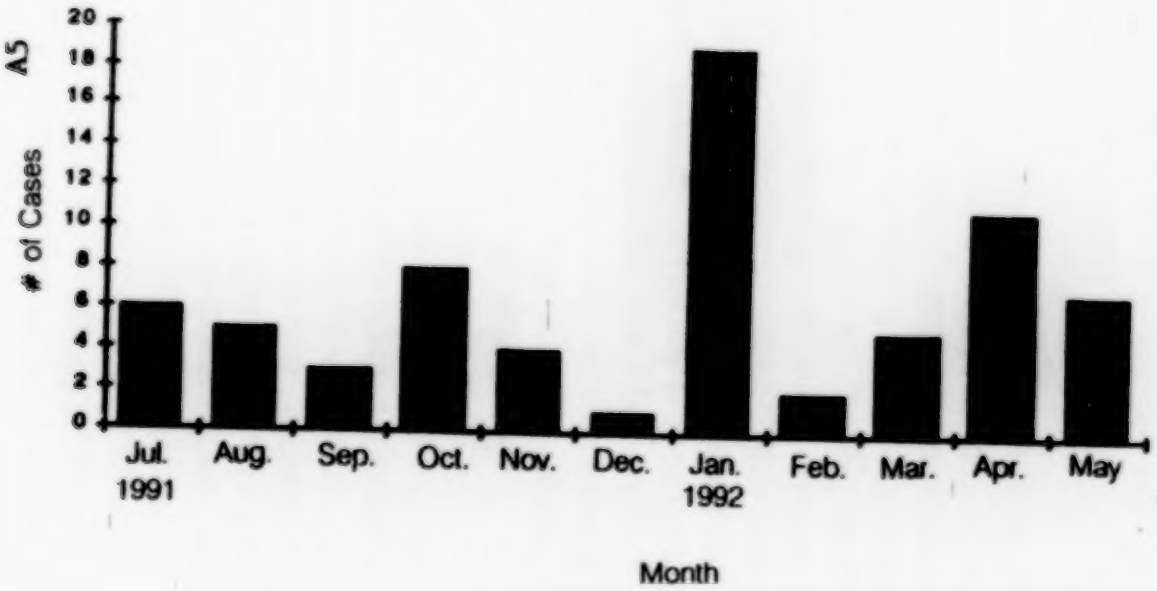
3. Aug. 23, 1989 Yusuf Hawkins, a black teen-ager, is confronted by a gang of white teen-agers and shot in Bensonhurst, Brooklyn.

4. April and May 1990 A dispute between a Korean grocer and a black customer in the Flatbush section of Brooklyn provokes demonstrations.

5. Aug 19, 1991 A Jewish driver loses control of his car in Crown Heights, Brooklyn, killing a black child.

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The Conflict Generating Potential of Bias Crimes:
The Bronx, New York 1991 - 1992



Source: New York City Police Department

DESCRIPTION OF THE *AMICI CURIAE*

The California Association of Human Rights Organizations ("CAHRO") is a state-wide network of human rights and human relations associations. Its purpose is to promote full acceptance of all persons in all aspects of community life without regard to any arbitrary definition of differences; to engage in activities designed to protect basic human and civil rights; to participate in the development of public policy related to human and civil rights; and to serve as a resource in the resolution of inter-ethnic and inter-group conflicts. The municipalities and areas in which CAHRO's member organizations are located represent approximately 2/3's of the population of the State of California.

The Center for Democratic Renewal ("CDR") is a national nonprofit, tax-exempt clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs of research leadership training, community organizing, public education and litigation. With offices in Atlanta, Georgia; Kansas City, Missouri and Seattle, Washington, the CDR also aids the victims of bigoted violence through telephone counseling and emergency assistance. The CDR serves a diverse national constituency of more than 10,000 members and supporters throughout the United States.

Community United Against Violence ("CUAV") is a 13 year old San Francisco-based nonprofit organization dedicated to preventing violence against lesbians and gay men as well as providing direct services to treat the victims of hate violence against lesbians and gay men.

CUAV programs involve victim support, education, and community outreach. CUAV is one of the first organizations of its kind in the United States.

The Human Rights/Fair Housing Commission of the City and County of Sacramento is a government agency responsible for inter-group relations and the maintenance of equal opportunity in such areas as employment and housing.

The International Association of Official Human Rights Agencies is the non-profit association of statutory human rights and human relation agencies primarily located in the United States and Canada. The United States member agencies are responsible for enforcing a variety of state and local civil rights laws in their respective jurisdictions. Many of the member agencies have responsibility for monitoring, investigating, and/or, through educational outreach programs, combatting bias crimes and underlying inter-community tensions which lead to such crimes. A number of the agencies act as advocates for the victims of bias crimes and provide assistance in dealing with the emotional and psychological impact of such crimes. Some member agencies provide training to law enforcement officers in identifying, investigating and resolving bias crimes.

The Los Angeles County Commission on Human Relations is a government agency that was founded in 1944. It is one of the oldest human relations agencies in the United States. Its primary mission is to promote improved human relations, civic peace, inter-group understanding, and the full acceptance of all persons in all aspects of community life. It is also the Commission's objective to reduce and eventually eliminate inter-group

violence, conflict, and tension, as well as discrimination and prejudice based upon race, religion, sex, sexual orientation, national origin, age, disability, or any arbitrary factor.

The National Association of Human Rights Workers ("NAHRW"), organized in 1947, is composed of individuals who are engaged in human and civil rights work as professionals. The NAHRW encourages collection and sharing of ideas and information on the improvement of inter-group relations as well as the exchange of information and research on dealing with racial, religious and ethnic cultural relations.

The New York City Commission on Human Rights is the government agency mandated by the New York City Administrative Code to combat discrimination in housing, employment and public accommodations and to enhance the quality of inter-group relations in the City of New York.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") founded in 1980, provides counseling and advocacy to men and women who have been victims of anti-gay or anti-lesbian violence, sexual assault, domestic violence, HIV-related violence and other forms of crime. AVP is the only lesbian and gay identified crime victim service provider in New York State, and the only crime victim agency to devote substantial resources to bias-related violence. During 1991, AVP provided services to survivors in 592 cases of anti-gay/lesbian crime, a 93% increase over 1990.

North Carolinians Against Racist And Religious Violence is a statewide nonprofit organization which

monitors white supremacist organizations in the state; provides victim assistance; educates on issues of racism and bigotry; and advocates for changes in public policy.

The Santa Clara County Human Relations Commission is a government agency that advocates for and takes affirmative action to eliminate prejudice and discrimination in Santa Clara County, California, based on race, religion, national origin, cultural background, sex, age, sexual orientation or disability, and to promote peace and harmony in the community between individuals and between groups.

Supreme Court, U.S.
FILED
JAN 27 1993
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No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

—v.—

TODD MITCHELL,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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Barclay v. Florida, 463 U.S. 939 (1983) 14

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Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 502 U.S. __, 112 S.Ct. 501 (1991) 15

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Rule 403, Federal Rules of Evidence 21

Other Authorities

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Barendt, FREEDOM OF SPEECH (1985) 23

Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (1966) 21

Gellman, "Sticks And Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional And Policy Dilemmas Of Ethnic Intimidation Laws," 39 U.C.L.A. L.Rev. 333 (1991) 11, 18, 22, 23

Greenawalt, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989) 22

Note, "Bringing Hate Crime Into Focus: The Hate Crime Statistics Act of 1990," 26 Harv.C.R.-C.L.L.Rev. 261 (1991) 19

Nowak & Rotunda, CONSTITUTIONAL LAW (4th ed. 1991) 19

INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights.

Since its founding in 1920, the ACLU has been a zealous advocate of the First Amendment and has steadfastly opposed government efforts to regulate either free speech or thought, no matter how well-intentioned those efforts might be. This commitment to free speech has led the ACLU to defend numerous clients whose political ideologies are abhorrent to most members of the organization. We have done so, nonetheless, because of our belief that civil liberties are indivisible, and that free speech rights cannot be granted to some and denied to others. Largely for these reasons, the ACLU filed an *amicus curiae* brief last Term in *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538 (1992), arguing that the challenged ordinance was fatally overbroad and thus threatened important free speech values.

The ACLU's commitment to free speech has always stood side-by-side with its commitment to equal protection of the laws. Thus, throughout its seventy-year history, the ACLU has consistently argued in favor of anti-discrimination laws and has frequently supported the constitutionality of such laws in cases before this Court. *See, e.g., New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1987).

The issue in this case has been framed by some as a choice between preventing discrimination or preserving free speech. We believe this misstates the issue, as set forth more fully below, and that the Wisconsin statute can be upheld in a manner that is consistent with First

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Amendment principles. Clearly, however, this case touches on matters of fundamental importance to the ACLU. We therefore submit this brief as *amicus curiae* to offer the Court the benefit of our views.

STATEMENT OF THE CASE

On October 7, 1989, respondent Mitchell was one of several blacks gathered outside an apartment complex in Kenosha, Wisconsin. Prior to moving outside, some members of the group had been discussing a scene portraying the racist beating of a young black child in the movie "Mississippi Burning." Upon joining the discussion, Mitchell turned to the others, most of whom were younger, and said: "Do you all feel hyped up to move on some white people?"

Shortly after this comment, Mitchell spotted a white teenager named Gregory Reddick walking down the other side of the street. Mitchell turned again to the group and said: "There goes a white boy; go get him." Mitchell then counted to three. In response, the group (which at that point numbered around ten) ran towards Reddick, beat him without provocation, and stole his sneakers. As a result of the beating, Reddick was in a coma for four days. He suffered extensive injuries and may have suffered permanent brain damage.[2]

Following a jury trial, Mitchell was convicted of aggravated battery. In addition, the jury found that Mitchell had intentionally selected Reddick as his victim because of Reddick's race. This separate finding triggered Wisconsin's penalty enhancement statute, which provides for increased punishment when the defendant,

[2] This statement of facts is taken from the majority opinion of the Wisconsin Supreme Court. *State v. Mitchell*, 485 N.W.2d 807, 809 (1992).

> intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Wis.Stat. §939.645.[3] Thus, rather than the two years imprisonment he would otherwise have faced for aggravated battery, Mitchell was sentenced to four years in prison.[4]

On appeal, the Wisconsin Supreme Court declared its state's penalty enhancement statute unconstitutional. Describing the law as a "hate crime" statute, 485 N.W.2d at 810, a majority of the Wisconsin Supreme Court concluded that the law impermissibly punished respondent for his thoughts, rather than his deeds, in violation of the First Amendment. In reaching this conclusion, the majority relied, in part, on this Court's decision in *R.A.V. v. City of St. Paul*, 112 S.Ct 2538. There were two dissents. Both found *R.A.V.* distinguishable, both found the state's interest in eliminating discrimination compelling, and both found that the Wisconsin statute properly focused on respondent's unlawful conduct.

[3] The statute has recently been amended in ways that are not material to the issue before this Court.

[4] Under Wisconsin's penalty enhancement statute, the trial judge could have increased Mitchell's penalty for aggravated battery by as much as five years. Mitchell was also convicted of theft. On that charge, he received a four year prison sentence, which was stayed, and a four year period of consecutive probation. Mitchell's sentence for theft, unlike his sentence for aggravated battery, was not enhanced by the trial court. 485 N.W.2d at 809 n.3.

SUMMARY OF ARGUMENT

The constitutionality of so-called hate crime statutes has engendered enormous debate around the country in recent years.[5] That debate is an important one and ultimately must be resolved by this Court. However, the existence of that debate should not obscure the substantial consensus that unites all the parties to this controversy. Even those who oppose the Wisconsin statute would agree that bigotry can lead to violence, and that violence prompted by bigotry is a serious social problem that must be addressed. Conversely, even those who support Wisconsin's law must acknowledge that the First Amendment bars the state from punishing individuals for their bigoted thoughts.

Seen in this light, the current dispute has less to do with principles than perspective. If we agreed with the Wisconsin Supreme Court that Mitchell has been punished for his thoughts, we would also agree that the Wisconsin statute that authorized his punishment must be struck down. But, because we disagree with the premise of the Wisconsin Supreme Court, we also disagree with its conclusion.

Mitchell was not punished for his beliefs, he was punished for *acting* on those beliefs. This distinction is central to every antidiscrimination law. For example, a landlord need not believe in racial equality but he may not act on those beliefs by refusing to rent to tenants on the basis of race without violating federal law.

According to the Wisconsin Supreme Court, the difference between this statute and other antidiscrimination

---

[5] For example, on successive days this summer, Ohio's hate crime statute was upheld by its state's highest court, *State v. Wyant*, 597 N.E. 2d 450 (Ohio Sup.Ct. 1992), while Oregon's hate crime statute was struck down by its state's highest court, *State v. Plowman*, 838 P.2d 558 (Ore.Sup.Ct. 1992).

laws is that this statute focuses on motive rather than intent. There are several fallacies with that reasoning. First, the meaning of these terms is hardly self-evident. Why is Mitchell's choice of Reddick as a victim a question of motive, while a landlord's choice of tenants on the basis of race is a question of intent? Second, it is simply not true that the law never takes a defendant's reasons into account when imposing sentence. To the contrary, it is quite common for judges to consider a defendant's motives during the sentencing process. The decision below never explains why the legislature should be disabled from considering sentencing factors that judges routinely take into account.

The Wisconsin Supreme Court also erred in its reliance on *R.A.V.* The local ordinance struck down in that case was aimed directly at speech. By contrast, a penalty enhancement statute never comes into play until the defendant has been convicted for an underlying, substantive crime. In *R.A.V.*, the defendant was charged with engaging in an act of symbolic expression; here, Mitchell was arrested for participating in a vicious act of physical brutality. The two situations are simply not analogous.

To be sure, a penalty enhancement statute means that similar criminal acts may be treated differently depending on whether the victim was chosen based on some immutable characteristic. There is no more reason to question those lines in this context, however, than in any other antidiscrimination context. Indeed, there are powerful reasons -- both moral and practical -- why society should be especially concerned about acts of violence based on a victim's group status. These distinctions, unlike the ordinance in *R.A.V.*, have nothing to do with society's desire to suppress unpopular ideas or limit public debate.

Unfortunately, there is always the risk that hate crime statutes will be misused, and that their misuse will have a significant chilling effect on First Amendment

rights. Thus, while we believe the decision below should be reversed, we also believe the Court should use this opportunity to set forth a clear set of rules governing the use of such statutes in the future. First and foremost, the existence of a penalty enhancement statute does not entitle the state to conduct a limitless probe into a defendant's political views. Thus, a defendant's words are only relevant if the government proves that they are directly related to the underlying crime and probative of the defendant's discriminatory intent. Without this clear nexus, the defendant's thoughts and expressions remain constitutionally protected and inadmissible. Moreover, the requisite discriminatory intent must be proven beyond a reasonable doubt. This standard cannot be met in ordinary circumstances merely by showing that the defendant uttered a racial epithet during the commission of a crime. Finally, trial courts must be vigilant to ensure that penalty enhancement statutes do not themselves become a vehicle for discrimination against minority groups.

ARGUMENT

I. THE DECISION TO IMPOSE ADDITIONAL PUNISHMENT FOR BIAS CRIMES REFLECTS SUBSTANTIAL STATE INTERESTS THAT CAN BE ACKNOWLEDGED WITHOUT VIOLATING THE FIRST AMENDMENT

The decision below rests on the premise that Wisconsin's hate crime statute was invoked in this case to punish Mitchell for his thoughts in violation of the First Amendment. Simultaneously, however, the majority opinion concedes the constitutionality of numerous civil rights laws on the federal, state, and local level that prohibit discrimination of various sorts. This inconsistency is central to understanding the decision below, and fatal to its reasoning.

Seizing on this paradox, Justice Bablitch posed a series of questions in his dissenting opinion that put the issues in this case into sharp focus:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

485 N.W.2d at 820.

There is no satisfactory answer to these questions, or at least none that is offered by the Wisconsin Supreme Court. Specifically, its reliance on the purported distinction between motive and intent does not withstand scrutiny. If anything, the decision below demonstrates that these terms are so easily subject to manipulation that they simply cannot form the basis for resolving the important social, political, and legal issues at stake in this case. Similarly, the reliance by the majority below on this Court's decision in *R.A.V.* is misplaced. Like the discussion of motive and intent, it ignores the fundamental difference between speech and action that has always been pivotal in First Amendment law. Finally, the decision below undervalues the state interest in treating bias crimes more severely, not because of the ideas they reflect but because of the unique damage they cause, both to the individuals affected and to the heterogeneous so-

ciety in which we all live.

A. Respondent Was Not Punished For His Thoughts

Contrary to the view of the majority below, respondent is not facing an additional two years in prison because the State of Wisconsin disapproved of his attitude toward whites. *Cf. Street v. New York*, 394 U.S. 576 (1969)(overturning flagburning conviction because of risk that defendant was punished for condemning the flag rather than burning it). Respondent is facing an additional two years in prison because he deliberately chose the victim of his assault on the basis of race. Until he engaged in this discriminatory behavior, respondent was free to think and say whatever he wished. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989). Once he engaged in this discriminatory behavior, respondent crossed a crucial constitutional line.[6]

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[6] We do not mean to suggest that the same reasoning could be used to sustain *any* hate crime statute. In this sensitive area, language matters. For example, Florida law provides for an enhanced penalty if the commission of a crime "evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim." Fla.Stat. §775.085. There are several constitutional problems with this statutory approach. First, the Constitution does not permit the government to punish "prejudice," which is what the Florida statute purports to do on its face. As this Court made clear in *Texas v. Johnson*, 491 U.S. at 414:

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

See also Stanley v. Georgia, 394 U.S. 557, 566 (1969)(legislation may not be premised "on the desirability of controlling a person's private thoughts"). Second, it is impossible to know with any precision what is meant by the phrase, "evidences prejudice." This vagueness, at the very core of the statute, creates a constitutionally intolerable risk of discriminatory enforcement based on the popularity of a person's

(continued...)

It is true, of course, that Wisconsin's hate crime statute only applies if the victim was "intentionally select-[ed]" on the basis of race (or other immutable characteristic). It is also true that this finding requires some inquiry into the thought processes of the defendant at the time the crime is committed. It is not true that this inquiry automatically violates the First Amendment, or that it is nearly as unusual as the decision below suggests.

To the contrary, numerous discrimination cases turn on the claim that the victim of discrimination was targeted for disadvantageous treatment because of some characteristic that the law deems irrelevant. Such claims of "disparate treatment" can and do arise in many different contexts, civil and criminal. For example, an employer who discriminates on the basis of race is subject to civil remedies under Title VII, 42 U.S.C. §2000e-2.[7] A landlord who discriminates on the basis of race is subject to criminal prosecution under the Fair Housing Act. 42 U.S.C. §3631.[8] Under both Title VII and the Fair Hous-

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[6] (...continued)
ideas. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974)(vagueness doctrine applies with special force in a First Amendment context). For these reasons, the ACLU of Florida has filed an *amicus curiae* brief with the Florida Supreme Court asking it to declare Florida's hate crime statute unconstitutional. *See State v. Stalder* and *State v. Leatherman*, Case Nos. 79,924 & 80,126 (consolidated July 23, 1992).

[7] *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)("proof of discriminatory motive is critical" in "disparate treatment" cases under Title VII). Equal protection claims under the Fourteenth Amendment also require a showing of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229 (1976). Under 42 U.S.C. §1981, which protects the right to make contracts and hold property free of discrimination, the availability of punitive damages depends on a showing of "evil motive or intent." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

[8] *See also* 18 U.S.C. §242 (making it a federal crime for anyone acting

(continued...)

ing Act, the proof of discrimination often includes statements by the defendant that help to explain conduct that might otherwise be subject to differing interpretations. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990). Yet, no one has ever successfully argued that either statute is inconsistent with the First Amendment simply because it prohibits intentional discrimination. *Cf. Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Nor is the Wisconsin Supreme Court prepared to take on that battle. Rather, the majority below attempts to differentiate Wisconsin's hate crime statute from other antidiscrimination laws by asserting that traditional antidiscrimination laws punish an "objective act" while the hate crime statute punishes a "subjective mental process." 485 N.W.2d at 817. What the decision below does not fully explain is why this is so.

To the extent that one can infer the lower court's rationale, it appears to be that there is no prohibited conduct in the traditional disparate treatment cases unless the defendant has acted for discriminatory reasons. Thus, the defendant's discriminatory reasons are inseparable from the "objective act" of discrimination that justifies the state's intervention. By contrast, the state has an interest in punishing assault regardless of the defendant's

---

[8] (...continued)
under color of law to deprive another person of rights secured by the Constitution "by reason of" the victim's color or race). More than a half-century ago, this Court explained the rationale for such laws:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties is emphasized by events familiar to all. These and other transgressions of those limits the state may appropriately punish.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

reasons. Accordingly, increasing the penalty because the defendant has acted for discriminatory reasons punishes the defendant for his thoughts.

The problems with this formulation are apparent. Selecting an assault victim on the basis of race *is* an "objective act" of discrimination. The fact that this "objective act" may be proven by reference to the defendant's words is no different than any other antidiscrimination law. The fact that assaults are otherwise prohibited should increase the state's concern with discrimination rather than diminish it. And the fact that Wisconsin has chosen to enact a penalty enhancement statute rather than create a new substantive crime of discriminatory assault is a convenience of drafting and not, as the Wisconsin Supreme Court apparently believes, a fatal constitutional flaw.

Recasting the argument in terms of motive and intent neither illuminates nor redeems the decision below.[9] Indeed, it is not at all clear that Wisconsin's hate crime statute even punishes motive, if motive refers to the reason "why" a person acts in a certain fashion. 485

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[9] The Wisconsin Supreme Court's discussion of motive and intent borrows heavily from an influential law review article on the subject. *See* Gellman, "Sticks And Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional And Policy Dilemmas Of Ethnic Intimidation Laws," 39 U.C.L.A. L.Rev. 333 (1991). Summarizing her argument, Gellman states:

> Discrimination and bigotry are not the same thing: the former is an illegal act, the latter is a constitutionally protected (albeit odious) attitude. Just as bigotry can exist without being acted upon, discrimination can occur without racist motivation. It is the discriminatory action, and not the racial motive that Congress intended to prohibit in [the federal antidiscrimination] statutes.

Id. at 368-69. We agree. However, we also believe the Wisconsin hate crime statute can be upheld on precisely the same grounds.

N.W.2d at 813 n.11.[10] There are numerous explanations for why respondent may have selected Reddick as an assault victim. One, certainly, is a genuine racist feeling. Another equally plausible explanation, however, is that Mitchell, like many adolescents, was simply trying to impress his friends. It is even possible that Mitchell was primarily interested in stealing Reddick's sneakers and used racial rhetoric only because he thought it was most likely to spur the others on. In short, the reasons why Mitchell acted remain a mystery on this record. All the prosecution showed, and all the prosecution was required to show under Wisconsin's hate crime statute, was that Mitchell acted on the basis of race.[11]

Whether this showing is characterized as the "why" or the "what" of respondent's behavior is not a fixed and determinate judgment. Rather, it is a judgment that is almost entirely contingent on how one views the state's interest in this case. If the state's interest is limited to punishing assaults, then the decision to target Reddick because of his race only explains "why" Mitchell acted in the manner he did. On the other hand, if the state has a legitimate interest in treating bias attacks as a separate and independent offense, then the decision to target Reddick because of his race is part of "what" made Mitchell's conduct unlawful. Thus, the distinction between motive and intent does not advance the discussion; at most, it merely rephrases the question.

[10] In the course of its opinion, the majority below expressed the view that the reference to intent in Wisconsin's hate crime statute was only a subterfuge for the legislature's real preoccupation with motive. This is, at best, a political observation and not the sort of authoritative construction of state law that is entitled to deference by this Court. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[11] For this reason, the term "hate crime" statute is actually a misnomer. It is nevertheless used throughout this brief for the sake of convenience since it is the term employed by the Wisconsin Supreme Court.

Even if the distinction between motive and intent were clearer than it appears in this and many other cases, the majority below plainly overstated the law by suggesting that motive can never be part of the sentencing process. Sentencing decisions frequently take motive into account. On the most extreme level, the difference between capital punishment and life imprisonment in many states may depend, *inter alia*, on whether the murder was committed for financial gain. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 768 n.1 (1990). And, surely nothing in the Constitution forbids a sentencing judge from distinguishing between a defendant who steals to care for his ailing parents and a defendant who steals out of personal greed.

This very issue was before the Court in *Dawson v. Delaware*, __ U.S. __, 112 S.Ct. 1093 (1992). The defendant in that case had been sentenced to death based, in part, on evidence that he had been a prison member of the Aryan Brotherhood, a white supremacist organization. The Court ruled that the admission of this evidence violated the First Amendment because there had been no showing that Dawson's membership in the Aryan Brotherhood had any relationship to the murder he committed while an escapee. *Id.* at 1098.[12] At the same time, however, the Court was unwilling to accept the "broad" contention that a defendant's sentence may never be affected by beliefs or activities that would be protected by the First Amendment, and thus immune from punishment, in other contexts. *Id.* at 1097.[13] As the

[12] The ACLU took the same position in its *amicus* brief.

[13] Under the circumstances of this case, it is far from certain that Mitchell's statements would be protected under traditional First Amendment doctrine. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (First Amendment does not protect speech intended and likely to lead to imminent lawless action).

Court noted, such evidence has traditionally been admissible for sentencing purposes when it bears a direct relationship to the crime charged. *E.g., Barclay v. Florida*, 463 U.S. 939, 949 (1983)(racial "elements" of crime may be considered during sentencing).

The Wisconsin Supreme Court rejected this nuanced approach in favor of a *per se* rule that has no support in this Court's precedents. In response to the dissent's citation to *Dawson*, the majority below insisted that there is a constitutionally significant difference between relying on motive to determine the defendant's initial sentence and relying on motive to determine the applicability of a penalty enhancement statute. 485 N.W.2d at 815 n.17. It may well be true that the sentencing process involves one step in the first instance and two steps in the latter. But beyond stating this difference, the majority below offers no explanation of why it should matter.[14]

Only a few weeks ago, this Court ruled that abortion clinics could not prevail in a suit against Operation Rescue under 42 U.S.C. §1985 without establishing the existence of class-based animus. *Bray v. Alexandria Women's Clinic*, 61 U.S.L.W. 4080 (Jan. 13, 1992). The Court further held that the requirement of class-based animus demands "at least a purpose that focuses upon women *by reason of their sex*" or "*because they are women*." *Id.* at 4081-82 (emphasis in original). For all practical purposes, this is precisely the same showing that Wisconsin demands as a predicate for invoking its penalty enhancement statute. What is constitutional in one context is no less constitutional in the other.

[14] If anything, the necessity of proving discriminatory intent beyond a reasonable doubt in a hate crime prosecution governed by the rules of evidence provides a defendant with greater protection than the traditional sentencing schemes.

B. *R.A.V.* Is Not Controlling

In *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, this Court reviewed a local ordinance that made it illegal to knowingly engage in symbolic speech, including the burning of a cross, that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Five members of the Court concluded that the ordinance represented an impermissible regulation of speech on the basis of content, even when limited to "fighting words." Four members of the Court found that the law was unconstitutionally overbroad because it reached protected speech. Of critical importance, however, all nine members of the Court in *R.A.V.* agreed that the law was directly aimed at expression.

This case involves very different concerns. As noted above, Wisconsin's hate crime statute is not aimed at expression, it is aimed at the discriminatory act of selecting a criminal victim on the basis of race or other group characteristic. Similarly, the Wisconsin statute is not triggered by a finding of "anger, alarm or resentment," with all the problems that finding presents in a First Amendment context. Instead, the Wisconsin statute can only be invoked if it is shown that the defendant violated an underlying (and racially neutral) provision of the criminal law in a deliberately, discriminatory fashion.

By focusing on discrimination rather than speech, the Wisconsin statute avoids the constitutional problems that plagued the St. Paul ordinance struck down in *R.A.V.* Specifically, the Wisconsin statute does not punish "speakers who express views on disfavored subjects," 112 S.Ct. at 2547, nor does is it designed to "drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. __, 112 S.Ct. 501, 508 (1991). Bigotry is an idea, discrimination is an act. The First Amendment protects the former, it does not and should not protect the latter. As the Court stated in *Norwood v. Harrison*,

413 U.S. 455, 469 (1973), "the Constitution . . . places no value on discrimination."

Nothing in *R.A.V.* diminishes the force of the well-established distinction between discriminatory beliefs and discriminatory behavior. To the contrary, this distinction is crucial to understanding the decision in *R.A.V.* Thus, Justice Scalia's majority opinion went out of its way to reaffirm the validity of Title VII and other antidiscrimination laws. 112 S.Ct. at 2546. The Court did so, moreover, despite its recognition that discrimination is often proven by speech and, in some circumstances, may depend almost entirely on speech. *Id.* at 2545-47.[15] Nevertheless, Justice Scalia carefully explained, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. A necessary corollary of that proposition is that antidiscrimination laws do not "target" expression even if they rely on expression to prove discrimination. If that is true in Title VII, it is equally true here.[16]

The Wisconsin Supreme Court's reliance on *R.A.V.*

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[15] *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)(Title VII bars the creation of a "hostile working environment" that inhibits equal employment opportunities). *See generally Cox v. Louisiana*, 379 U.S. 559, 563 (1965)("It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

[16] Under prevailing doctrine, this Court has shown greater deference to laws that are not aimed at "the suppression of free expression," even if they have an incidental impact on speech. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Applying *O'Brien*, Wisconsin's hate crime statute can be upheld if it advances a substantial state interest. In fact, it does more. As this Court has frequently noted, the elimination of discrimination is a "compelling state interest[] of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

is also undermined by Justice Scalia's discussion of 18 U.S.C. §871, which makes it a federal crime to threaten the life of the President, although most threats are not otherwise covered by federal law. Because of this disparity in treatment, the decision to intentionally target the President has sentencing implications that are not substantially different than the increased punishment facing a defendant in Wisconsin who intentionally selects a victim on the basis of race. Yet, the *R.A.V.* majority perceived no significant First Amendment difficulty with 18 U.S.C. §871 as long as the government does not "criminalize only those threats against the President that mention his policy on aid to inner cities." 112 S.Ct. at 2546.

Judged by this same standard, the decision below is clearly erroneous. Under Wisconsin's hate crime statute, it does not matter whether the defendant was acting on the basis of genuine prejudice or misguided bravado. *See* p.12, *supra*. Thus, in analyzing this statute, as in analyzing 18 U.S.C. §871, the critical issue is not whether the defendant's sentence can be affected by the status of the victim he has selected, but whether the lines the state is drawing reflect substantial interests unrelated to the suppression of ideas. *See* n.16, *supra*. As explained more fully below, we believe they do in this case.

C. The State Has An Overriding Interest In Curbing Discriminatory Acts Of Violence

The central fallacy of the decision below is its failure to recognize that bias attacks produce unique injuries -- to the victim and to society -- that fully justify Wisconsin's decision to treat them more harshly than ordinary assaults. "Conduct that creates special risks or causes special harms may be prohibited by special rules." *R.A.V.*, 112 S.Ct. at 2561 (Stevens, J., concurring). One may not believe that hate crime statutes are an effective way to deal with the special harms posed by bias attacks.

See Gellman, *supra* n.9, at 388-93. But a legislature is clearly free to conclude otherwise and to adjust the level of punishment accordingly.

The sort of bias attack that took place in this case is more than an assault on the victim's physical well-being. It is an assault on the victim's essential human worth. A person who has been singled out for victimization based on some group characteristic -- such as race, religion, or national origin -- has, by that very act, been deprived of the right to participate in the life of the community on an equal footing for reasons that have nothing to do with what the victim did but everything to do with who the victim is.[17] In short, a bias attack is as much an attack on the victim's persona as on the victim's person. Recognition of that fact inevitably produces a sense of vulnerability, isolation and oppression that rarely disappears when the physical injuries heal. *Cf. United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp. 330, 343-44 (E.D.La. 1965)(three-judge court).

By their very nature, moreover, these harms are not confined to the actual victim. Because bias crimes are triggered by the victim's membership in a larger group, the feelings of vulnerability and injustice created by bias

[17] Certain civil rights laws address this connection explicitly by requiring proof that the defendant's conduct deprived the victim of a constitutional right or other legally protected interest. *See, e.g.*, 18 U.S.C. §242. Typically, however, such statutes do not otherwise define the conduct they prohibit. The requirement of specific intent is therefore necessary to relieve significant vagueness problems. *See Screws v. United States*, 325 U.S. 91, 102 (1945). Wisconsin's hate crime statute does not suffer from the same vagueness problems because it can only be invoked after there has been an underlying criminal conviction. Moreover, it is difficult to conceive of a bias attack that would not also deprive the victim of a constitutional right or other legally protected right. Little purpose is served by requiring the government to prove a tautology. In this case, for instance, the victim plainly had a legal right to walk down the streets of his hometown without being beaten because of his race.

crimes are frequently and understandably shared by other members of the group. *Cf. NAACP v. Alabama*, 357 U.S. 449, 462-63 (1957). In a very real sense, therefore, every bias crime has multiple victims whose interests are entitled to consideration as part of the sentencing process.

Finally, a state that chooses to respond to these concerns by enhancing the penalty for hate crimes can fairly claim to be furthering many of the traditional purposes of the criminal law. As a matter of retributive justice, society can certainly decide that bias attacks are worthy of special moral condemnation because of the particular way that they dehumanize the victim. As a matter of special deterrence, society has every right to be concerned that the perpetrators of hate crimes pose a special risk of recidivism. *See* Nowak & Rotunda, CONSTITUTIONAL LAW 112 (4th ed. 1991). As a matter of general deterrence, there is surely reason to be concerned by the statistical rise in the number of hate crimes reported throughout the country. *See* Note, "Bringing Hate Crime Into Focus: The Hate Crime Statistics Act of 1990," 26 Harv.C.R.-C.L.L.Rev. 261 (1991). If nothing else, events of the past year -- from Los Angeles to Crown Heights -- tragically highlight the relationship between bias attacks and social unrest.

Simply put, there is more at stake from a bias attack than from an ordinary crime. Wisconsin's hate crime statute represents a permissible response to those increased stakes.[18]

[18] In our view, Wisconsin's hate crime statute is on its strongest constitutional footing when, as here, the underlying crime involves physical injury to the victim or damage to the victim's property. On its face, Wisconsin's law goes beyond these categories and would, for example, permit penalty enhancement for criminal defamation on the basis of race. *See* Wis.Stat. §942.01. Any such application of the law would raise serious constitutional problems. *Cf. American Booksellers Ass'n,*

(continued...)

II. ANY HATE CRIME STATUTE MUST BE CAREFULLY DRAFTED AND CAREFULLY APPLIED TO SATISFY FIRST AMENDMENT CONCERNS

Although we believe the Wisconsin hate crime statute is constitutional, both on its face and as applied, we recognize that it legislates in a constitutionally sensitive area and is easily susceptible to prosecutorial abuse. Given the proliferation of similar laws throughout the country,[19] it is essential for this Court to establish a clear set of constitutional guidelines designed to ensure that hate crime statutes do not become, as their critics predict and even their supporters fear, a vehicle for the suppression of unpopular ideas.

Most importantly, hate crime statutes must not be regarded as a general license to inquire into a defendant's beliefs, expressions, and associations. The defendant's words may sometimes prove the racial intent necessary to invoke a hate crime statute, as in this case, but those words must be specifically tied to the crime charged. Without this clear nexus, the defendant's speech should be deemed inadmissible.

In part, this conclusion flows from traditional rules of evidence. The fact that a defendant belongs to a racist organization and reads racist literature is generally

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[18] (...continued)
Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)(casting doubt on constitutionality of group libel laws). Nevertheless, we do not believe that the relatively unlikely possibility of such unconstitutional applications is sufficient to strike down the statute on overbreadth grounds. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[19] According to the latest report of the Anti-Defamation League, approximately half the states have now enacted penalty enhancement statutes. HATE CRIME STATUTES: A 1991 STATUS REPORT.

none of the state's business. Even in the context of a hate crime prosecution, its prejudicial impact outweighs its probative value. *See* Rule 403, Federal Rules of Evidence. In part, these evidentiary rules are constitutionally compelled by the First Amendment. Absent a direct relationship between the defendant's words and deeds, there is too great a risk that hate crime prosecutions will be used by the state as a means of thought control. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 (1982).

For obvious reasons, a defendant's speech is more likely to be relevant in a hate crime prosecution if it occurs at the same time as the underlying criminal activity. Conversely, the claim of relevance becomes more attenuated as the defendant's speech becomes more remote in time.[20] Knowing where to draw this line may require a difficult exercise in judgment, but it is not an unfamiliar one. For example, the Court has repeatedly held that a public employee may neither be discharged nor demoted on the basis of speech unless that speech directly affects the employee's job performance. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987).

The rule of constitutional relevance applied in the employment cases is not substantially different than the one we urge the Court to adopt here. "Th[e] judgment should be made in any particular case from a functional point of view with regard to the essential requirements of an uninhibited system of freedom of expression." Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 406 (1966). Furthermore, the concern over chilling effect is precisely the same. If the government is not able to

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[20] At a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test.

prove that an employee's speech is linked to job performance, the chances increase that the employer's punitive action is politically motivated. Likewise, if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired.

To minimize this risk, the defendant's discriminatory intent in any hate crime prosecution must be proven beyond a reasonable doubt (since it is most appropriately conceived as an element of the offense.) *See Noto v. United States*, 367 U.S. 290, 299 (1961)(First Amendment requires that intent be established "according to the strictest law"). Properly applied, this standard cannot be met in ordinary circumstances merely by showing that the defendant uttered a racial epithet during the commission of a crime. Two men engaged in a fight may hurl racial epithets at each other; that does not mean that either one started the fight for racial reasons. Racial epithets may be relevant to proving racial prejudice but racial prejudice, without more, cannot be the basis of a hate crime prosecution.[21]

Finally, courts must be vigilant to ensure that hate crime statutes do not themselves become a vehicle for discrimination against minority groups. As one commentator has noted with regard to hate speech statutes, which raise different but related concerns, "it may actually be angry members of underprivileged groups that end up being prosecuted most often" under such laws. Greenawalt, SPEECH, CRIME, AND THE USES OF LANGUAGE

[21] The dangers inherent in obscuring this line are illustrated by the decision of Florida authorities to prosecute a black man who referred to a police officer as a "white cracker" on the theory that this statement "evidence[d] prejudice" under the state's hate crime statute. *See* n.6, *supra*. The charges were ultimately dropped for insufficient evidence. *See* Gellman, *supra* n.9, at 361 n.134.

301 (1989).[22] The experience in other countries reinforces this concern. *See* Barendt, FREEDOM OF SPEECH 163 (1985)(reporting that British Race Relations Act has "often been used to convict militant black spokesmen"). Obviously, this Court must deal with the case before it. But, in dealing with the case before it, this Court can and should make an unambiguous statement that any such pattern of discriminatory enforcement will not be tolerated.

[22] *See also* Gellman, *supra* n.9, at 387.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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Dated: January 28, 1993

FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF AMICUS CURIAE THE JEWISH ADVOCACY CENTER In Support of Petitioner

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BRIEF OF AMICUS CURIAE THE JEWISH ADVOCACY CENTER In Support of Petitioner

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QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the United States Constitution prohibit states from enacting criminal statutes which authorize increased maximum penalties for crimes in which the perpetrator intentionally selected a crime victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

INTEREST OF THE AMICUS CURIAE

The Jewish Advocacy Center, founded in 1982, is a non-profit, tax-exempt, civil rights organization dedicated to fighting bigotry against all persons and to combatting anti-Semitism in particular. The Jewish Advocacy Center has been at the forefront of litigation on behalf of Jews and others to secure

fundamental constitutional rights in cases of unfair discrimination. The Center's focus is on bringing lawsuits for monetary damages against the perpetrators of bias-motivated violence. Awards of damages serve to compensate victims, punish perpetrators, and send the important message that discriminatory crime will not be condoned.

Nationwide, there has been a disturbing increase in the commission of so called "hate crimes" - crimes perpetrated against individuals because of the victims' actual or perceived race, religion, color, sexual orientation or national origin. Hate crimes represent a unique evil in society because of their particularly pervasive impact. A crime committed against an individual because of the

perception that the victim belongs to a certain group is, in essence, a crime committed against the entire group. The result is that whole groups of citizens feel intimidated, threatened and vulnerable to random acts of violence. Bias-motivated crimes not only have the effect of generating fear in all group members, but they tend to provoke retaliation as well. A potential consequence of crimes motivated by racial, religious or ethnic animus is that individual conflicts may escalate into large-scale disturbances, fragmenting what were once viable, cohesive communities.

Today, 46 states and the District of Columbia have legislation designed to punish hate crimes. ***Brief of Amici Curiae The Anti-Defamation League, et al. in Support of Petitions for Writ of Certiorari to the Supreme***

Courts of Wisconsin and Ohio, p.4. The Wisconsin penalty enhancement statute at issue in this case seeks to redress the hate crime problem by authorizing increased maximum penalties for otherwise criminal conduct if the perpetrator intentionally selected a victim because of that person's race, religion, color or other listed characteristic. As a representative of those directly harmed by hate crimes, the Center has a substantial interest in seeing that perpetrators of bias motivated crimes are punished on all levels - civilly, through awards of monetary damages and criminally, through increased fines and sentences.

Given the Jewish Advocacy Center's firm commitment to fight against religious, racial and ethnic discrimination and violence, the Center is

deeply concerned with the outcome of *State of Wisconsin v. Mitchell*. Statutes authorizing enhanced punishment for bias offenses are essential weapons in the war against bigotry and discrimination. They send the emphatic message that discriminatory conduct will not be tolerated. Hate crimes statutes also provide greater public protection by deterring discriminatory violence. The Jewish Advocacy Center is a staunch supporter of hate crimes legislation in general and of the Wisconsin penalty enhancement statute in particular. It seeks to demonstrate that criminal statutes which provide for enhanced penalties when there is discrimination in the victim selection process are constitutional under the First Amendment.

STATEMENT OF FACTS

The relevant facts were laid out by the Wisconsin Supreme Court in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 809 (1992):

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him."

> Mitchell then counted to three and pointed the group in Riddick's direction.
>
> The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery as a party to the crime. The jury separately found, under the Wisconsin penalty enhancement statute (1989-1990), that Mitchell intentionally selected Riddick as a victim because of Riddick's race. The aggravated battery charge carried a maximum sentence of two years. But because the jury found that Mitchell intentionally selected the victim because of his race, the penalty

enhancer operated to increase the available maximum sentence for aggravated battery to seven years. The trial court imposed a four year sentence on Mitchell for the battery of Gregory Riddick.

SUMMARY OF THE ARGUMENT

The remedy to the evils of bigoted and prejudicial speech is education and expressions of tolerance. But the means for fighting acts of discrimination are laws that punish discriminatory conduct. When a perpetrator intentionally selects a crime victim because of that victim's race, religion, color, disability, sexual orientation, national origin or ancestry, the offender commits an act of discrimination. The Wisconsin penalty enhancement statute punishes

criminal offenders who discriminate in the selection of victims. It authorizes increased maximum penalties for otherwise criminal conduct if the perpetrator intentionally selected a crime victim because of that person's race, religion or other listed characteristic.

A crime committed against an individual because of the victim's perceived or actual membership in a certain group is, in essence, a crime committed against the entire group and against the community. Bias-motivated crimes have the effect of generating fear in all group members and disturb the fabric of a pluralistic society. Hate crimes are a burgeoning problem on the American scene. They threaten the comity of the community and profoundly undermine our democracy. The Wisconsin

statute redresses the hate crimes problem by punishing discrimination in the selection of victims.

The Wisconsin law does not punish thought or speech. It does not make bigoted expression a crime, nor does it penalize individuals for expressing bias through legal channels. Rather, the statute confronts the larger social problem of the perpetration of criminal acts against individuals because of their perceived or actual membership in certain groups. The penalty enhancer only punishes those who act on their bias by committing criminal acts and discriminating in the selection of victims. The Wisconsin law thus leaves bigots free to spew their hatred through legal means. People who hate are not punished by the penalty enhancer. People who act on their

hatred in a criminal manner are penalized.

Unlike the hate crimes statute in *R.A.V. v. City of St. Paul, Minnesota*, which was struck down as an unconstitutional, content-based restriction of speech, the Wisconsin statute is not directed at the substance of speech. And, in harmony with other constitutionally valid antidiscrimination statutes, the penalty enhancer punishes discriminatory action, not biased thought. Because the Wisconsin statute does not punish expression, but is directed at a perpetrator's act of discrimination in selecting a crime victim, the law is constitutionally valid under the First Amendment.

ARGUMENT

I. THE WISCONSIN PENALTY ENHANCEMENT STATUTE IS VALID UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT PUNISH THOUGHT OR EXPRESSION, BUT IS DIRECTED AT A PERPETRATOR'S ACT OF DISCRIMINATION IN SELECTING A CRIME VICTIM.

As applied to defendant Todd Mitchell prior to its amendment, the Wisconsin penalty enhancement statute permitted the imposition of increased maximum penalties for all crimes in the Wisconsin Criminal Code if a fact-finder determined, beyond a reasonable doubt, that a perpetrator "intentionally selected" the person against whom the crime was committed or selected the property which was damaged "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that

property." Wis. Stat. Section 939.645(1)(b)

The purpose of the statute is to provide more severe penalties for otherwise criminal conduct when the perpetrator selects his or her crime victim because of that victim's race, religion, color or other listed characteristic. In other words, just as there are laws that prohibit discrimination in hiring, firing, education, public accommodations and housing, this law punishes discrimination in the selection of a crime victim. The statute seeks to deter the commission of so called "hate crimes" - acts of violence and other crimes perpetrated against individuals because of their immutable characteristics or their perceived or actual membership in certain groups.

Hate crimes are particularly destructive to society because of their pervasive impact. A crime committed against an individual because of the perception that the victim belongs to a certain group is, in essence, a crime committed against the entire group. Consequently, whole groups of citizens are put in fear of random attacks from perpetrators with whom they have no relationship. Bias-motivated crimes not only have the effect of generating fear in all group members, but they have a tendency to provoke retaliation. A potential consequence of crimes motivated by racial, religious or ethnic animus is that individual conflicts may escalate into large-scale disturbances, fragmenting what were once viable, cohesive communities.

Thus, when an offender selects a victim because of the perception that the victim belongs to a specified group, the perpetrator creates a unique and greater harm to society than would be the case were the offender to choose a victim based on individual animosity or arbitrariness. The Wisconsin penalty enhancement statute is directed at punishing offenders who, by their act of discrimination in the selection of victims, create distinct dangers to society. Under the Wisconsin Criminal Code, if a perpetrator commits a battery which was motivated by racial hatred, the offender is charged for the harm caused to that particular victim. The perpetrator is punished for the crime of battery committed against the individual. But the Criminal Code does not penalize the offender for the unique danger he or she created to

society by discriminating in the selection of a victim. The Wisconsin penalty enhancement statute punishes this act of dicrimination. Absent the penalty enhancer, the offender would be punished for the battery, but not for his or her act of discrimination which poses special threats to the community. By enacting section 939.645, the legislature simply intended to ensure that both the underlying crime and the larger act of discrimination would be penalized.

The act of discrimination targeted by the Wisconsin penalty enhancer and the harm that the statute seeks to redress become clearer on consideration of the following example. Assume, for instance, that a group of neo-Nazis are walking home late one evening after celebrating the initiation of a new

member. Still reveling and carousing in the streets, one member picks up a brick and hurls it through an apartment window. Unbeknownst to him, the apartment is owned by a Russian immigrant. The brick throwing member may be prosecuted for criminal damage to property. But the penalty enhancer could not be applied. There is no evidence that the crime victim was intentionally selected because of that victim's national origin.

Now, changing the scenario, assume that just prior to hurling the brick, the neo-Nazi member shouts: "Go home filthy immigrants!" Word of this incident would engender fear among the entire immigrant community. This is precisely the effect of discriminatory victim selection that the Wisconsin statute seeks to address. The penalty

enhancer may be applied in this instance, not because the neo-Nazi shouted a malicious epithet, and not in order to punish his bigoted speech, but because the neo-Nazi member acted on his bias by committing a criminal act and discriminating in the selection of his victim. Because choosing a victim on account of that person's race, religion and the like is more pernicious to society than when the victim is selected out of individual animosity or capriciousness, the legislature logically imposed a stiffer penalty. Crimes causing greater harm justify the imposition of greater punishment.

The Wisconsin penalty enhancement statute does not punish expression. It does not attempt to "drive certain ideas or viewpoints from the

marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, __ U.S. __, __, 112 S. Ct. 501, 508 (1991). What is penalized by the enhancer is the action of discriminating against another person through the perpetration of a criminal act. The statute is not aimed at either thought or speech. And, as the Court reasoned in *R.A.V. v. City of St. Paul, Minnesota*, __ U.S.__, 112 S. Ct. 2538, 2546-47 (1992), "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."

The proscribed conduct, itself, "intentionally selecting" a victim "because of" that person's characteristics, cannot reasonably be

construed as expression. Picking out an individual to victimize because of that person's status is action based on thought. For example, having in mind the idea that blacks and whites should not intermingle socially and that blacks should be beaten for doing so is, of course, pure thought protected by the First Amendment. Observing an interracial couple and feeling angered is, similarly, thought protected by the Constitution. Shouting racial slurs at a black man walking hand in hand with a white woman may also be protected speech. However, intentionally selecting to batter this man because of his race is an act of discrimination motivated by prejudicial thought. Intentional selection of a victim on account of that person's status is discrimination, not expression. Because the Wisconsin statute punishes

the act of discrimination in the victim selection process and not speech, it does not violate the freedom of expression guaranteed by the First Amendment.

In the case at hand, the prosecution successfully proved that Mitchell, an Afro-American, "intentionally selected" his victim "because of" that person's race under section 939.645. The state introduced provocative and inflammatory statements made by Mitchell to other blacks concerning white people prior to the battery of a white boy. Specifically, Mitchell asked a group of blacks: "Do you all feel hyped up to move on some white people?" And, on spotting a white boy, Mitchell urged, "You all want to fuck somebody up? There goes a white boy; go get him." *State of*

Wisconsin v. Mitchell, 485 N.W.2d 807, 809 (1992). Although the commission of an aggravated battery carries a maximum two-year sentence in Wisconsin, under the penalty enhancer, the maximum sentence was increased by five years. As a result, the judge was left free to impose a prison sentence of up to seven years against Mitchell.

Counsel for Mitchell contends, and the Supreme Court of Wisconsin held, that section 939.645 punishes bigoted thought in violation of the First Amendment because the underlying crime of aggravated battery is already punishable under the Wisconsin Criminal Code. Respondent's ***Petition for a Writ of Certiorari to the Supreme Court of Wisconsin, p.5–6, State of Wisconsin v. Mitchell,*** 485 N.W.2d 807, 812 (1992). The penalty enhancer thus

operated to increase Mitchell's punishment for battery soley because of his racist expression preceeding the crime. *Id.* The rationale is as follows. Defendant's speech was used to prove that he intentionally selected his victim because of that victim's race. Intentional selection translated into a greater penalty for Mitchell. Therefore, Mitchell was, in essence, punished for his racist speech. More generally the contention is that all crimes that fall within the scope of section 939.645 already carry penalties under the Wisconsin Criminal Code. *Id.* Once a crime is punished under the Code, the enhancement statute provides an additional and separate penalty for "what the legislature has deemed to be offensive thought" in violation of the First Amendment.

State of Wisconsin v. Mitchell, 485 N.W.2d 807, 811 (1992).

Counsel for Mitchell and the Wisconsin Supreme Court mischaracterize and misconstrue the Wisconsin law. They fail to recognize that there is a fundamental difference between making speech the crime itself and using speech as evidence to prove the crime. The penalty enhancement statute is not concerned with speech. It is concerned with an act of discrimination. Defendant's bigoted thought, speech or motive is not what is punished by the Wisconsin statute; the offender's act of discrimination is. Section 939.645 does not punish personal prejudice. It only punishes the bigot who acts on his or her thoughts by discriminating in the selection of crime victims. Mitchell is not being punished for

expressing his views. He is being sanctioned for his act of battering an individual because of that person's race.

Granted, speech made by the criminal offender in connection with a crime may be used as circumstantial evidence to prove that the offender "intentionally selected" a crime victim because of that victim's race, religion and the like. But it is an impermissible leap in logic to then conclude that the effect of the penalty enhancer is to punish the defendant's words rather than the act of discrimination. Words are routinely used as evidence to prove crimes, consistent with the First Amendment. For instance, the words "I'm going to kill you" can be used by the state to prove that the speaker committed the

crime of attempted murder. *State of Oregon v. Plowman*, 314 Ore. 157, __ P.2d __, 1992 WL 207677 (1992). Dissenting Judge Bablitch of the Wisconsin Supreme Court in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 822 n.3 (1992) points out that in sexual harassment cases words, themselves, are the proscribed conduct. He goes on to explain that words are not simply evidence of the crime of sexual harassment. They are the crime of sexual harassment. For instance, in *Volk v. Coler*, 845 F.2d 1422, 1426-27 (7th Cir. 1988), the plaintiff claimed that her supervisor called her and other female employees "honey," "babe" and "tiger." Yet, with regard to sexual harassment jurisprudence, no contentions have been successfully raised that freedom of

speech is being unconstitutionally abridged or chilled.

In connection with the statute at issue here, even if words are used to prove intentional selection of a crime victim, the speech itself is not what is penalized by the statute. Under the penalty enhancer, bigots are free to think, speak, publish or broadcast their biased views. It is only when an individual commits a crime and selects the victim because of certain characteristics that the criminal is exposed to stiffer penalties.

In respondent's *Petition for a Writ of Certiorari to the Supreme Court of Wisconsin, p.8*, respondent provides an example of a penalty enhancer that would undoubtedly be struck down as an unconstitutional restriction of speech and then reasons that this enhancer is comparable to the

Wisconsin statute. Respondent's hypothetical law prohibits "public burning" and provides a penalty enhancer whenever a person commits the offense of public burning "because of" opposition to government policy. Counsel for Mitchell claims that the Wisconsin statute is analogous to the hypothetical enhancer in terms of its effect on expression. The analogy is, of course, absurd, and the comparison demonstrates the extent to which the respondent has misconceived the Wisconsin statute. The penalty enhancer related to public burning, by its own terms, punishes expression. The Wisconsin law, in contrast, punishes discrimination. Public burning because of opposition to the government may be characterized as symbolic speech, which is protected by the First Amendment. Intentionally

selecting a crime victim because of that victim's race, religion or other noted characteristic has never been construed as speech, symbolic or otherwise, which is entitled to First Amendment protection.

II. THE WISCONSIN PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS FUNDAMENTALLY DISTINGUISHABLE FROM THE CONTENT-BASED, HATE CRIMES STATUTE STRUCK DOWN IN *R.A.V. v. CITY OF ST. PAUL, MINNESOTA*.

In *R.A.V.*, the United States Supreme Court struck down, on First Amendment grounds, a statute which made it a misdemeanor to place on public or private property a "symbol, object, ... graffiti, including, but not limited to, a burning cross or Nazi swastika which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or

gender." *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S. Ct. 2538 (1992). The Court found that the St. Paul statute prohibited a subclass of "fighting words" which expressed messages of specific types of group hatred. *Id.* at 2548. The Court pointed out that the ordinance did not prohibit the use of "fighting words" or displays to communicate antagonism on the basis of political affiliation or homosexuality, for example, and that, therefore, the statute was a content-based restriction of speech. *Id.* at 2547. The Court further held that the content discrimination was not necessary to achieve St. Paul's compelling interests and struck down the statute as violative of the First Amendment. *Id.* at 2550.

The St. Paul ordinance is a breed apart from the Wisconsin penalty enhancement law. By its own terms, the St. Paul statute is directed squarely at the substance of speech. It singles out for prohibition certain "fighting words" based on the content of the message communicated. The Wisconsin law, on the other hand, is not aimed at a category of speech. It is not concerned with expression. Its focus, rather, is on discrimination in the context of criminal activity. The penalty enhancement law does not punish an individual for expressing hatred through legal channels, such as speech and publication. Section 939.645 only penalizes one who expresses bias through criminal action. Thus, the Court may uphold the constitutionality of the Wisconsin penalty enhancer consistent with its decision in *R.A.V.*

Even if the Court were to conclude that the Wisconsin statute restricts speech on the basis of its content, the penalty enhancer would pass constitutional muster under the strict scrutiny test. The penalty enhancer "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. N.Y. Crime Vicitms Bd.*, __ U.S. __, __, 112 S. Ct. 501, 509 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S. Ct. 1722, 1728 (1987)). The State of Wisconsin has a compelling interest in eradicating discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Discrimination in the selection of crime victims may hamper the exercise of civil rights to the same extent that discrimination in

public accommodations, education, housing or employment interferes with fundamental freedoms. When citizens are subject to random attacks because of their race, religion, color and the like by perpetrators with whom they have no affiliation, they may be deterred, out of fear and intimidation, from living in certain neighborhoods, walking or driving through particular areas and attending special public and religious institutions. The state has a compelling interest in ensuring that its citizens have the freedom to exercise their civil rights and in guaranteeing equal access to publicly available goods and services.

The Wisconsin statute is necessary to protect citizens from being the targets of hate crimes because it punishes, directly, the act of

discrimination involved in victim selection, permits judges to impose longer sentences on perpetrators of hate crimes and deters bias-motivated crime by enhancing penalties. Furthermore, the penalty enhancer is "narrowly drawn" to protect citizens from crimes motivated by hate. The fact that only certain victim characteristics are listed does not reveal a state preference for the expression of some ideas over others. Rather, the state seeks to address the burgeoning problem of people being victimized specifically because of their race, religion, color, disability, sexual orientation, national origin and ancestry. What more narrowly tailored way to combat crime committed because of certain characteristics possessed by the victim then to provide for enhanced penalties

when it is proven that the perpetrator selected the victim because of these very characteristics. If the state were to include other victim traits, such as political affiliation, in its penalty enhancer when citizens are not being harmed because of these affiliations, the statute would not be "narrowly drawn."

Respondent, in its Petition for a Writ of Certiorari to the Supreme Court of Wisconsin p.14-15, suggests that the state could just as well achieve its interests by enacting a "content-neutral" penalty enhancer which would increase the criminal penalty for crimes committed "with a specific intent to create a terror within the community." But this enhancer would not serve Wisconsin's interest. Even if the perpetrator did not have the

larger intent of creating a terror within a community, but intended only to harm the individual victim because of that person's race or other such characteristic, the effect on members of the victim's group would be the same. Fear and intimidation would be felt by group members regardless of whether the perpetrator's intent reached as far as the entire community or was restricted to the individual victim.

III. THE WISCONSIN PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE, CONSISTENT WITH THE COURT'S DECISION IN *DAWSON v. DELAWARE*, IT DOES NOT PUNISH ABSTRACT BELIEFS.

In *Dawson v. Delaware*, __ U.S.__, 112 S. Ct. 1093 (1992), the United States Supreme Court held that the defendant's First Amendment rights were violated when the prosecution

introduced evidence, at a capital sentencing proceeding, of defendant's membership in an organization called the "Aryan Brotherhood." Defendant Dawson is white and was convicted of murdering a white female. The Court found that Dawson's First Amendment rights were violated by the admission of Aryan Brotherhood evidence because there was no demonstrated relationship between defendant's gang membership and the murder of his white victim. Specifically, the Court held the admission of Aryan Brotherhood evidence violative of the First Amendment because "the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 1098. Under *Dawson*, therefore, the Constitution forbids the consideration in sentencing of evidence concerning a defendant's beliefs when

those beliefs have no proven connection to the underlying crime.

Consistent with the Court's holding in *Dawson*, under the Wisconsin penalty enhancement statute, a criminal offender's "abstract beliefs" do not trigger a potential increased sentence because they fail to prove intentional selection of a crime victim. A perpetrator does not receive greater punishment under section 939.645 merely because he or she held or expressed biased beliefs prior to the commission of a criminal act. An individual may harbor prejudicial thoughts, voice biased views, join bigoted organizations and then commit a crime. But these facts, alone, do not subject the individual to enhanced penalties under the Wisconsin statute. *State of Wisconsin v. Mitchell*, 485 N.W.2d 807,

818 (1992) (J. Abrahamson, dissenting). For instance, assume the existence of a fervent anti-Semite who, on numerous occassions, has been heard to make such derogatory remarks as "dirty, bastard Jew" and "money-grubbing kike." Suppose further that the individual is a member of the "Wipe the Jews Off the Face of the Earth" association. Late one evening that individual spots a woman parking her $40,000 porsche on a poorly lit street. As the woman steps out of her car, he notices that her purse is dangling loosely from her shoulder. He sneaks up behind her, grabs the purse and runs off with it. It turns out that this woman is Jewish. The perpetrator may be prosecuted for robbery. But he would not be subject to increased penalties under the Wisconsin statute because he did not

"intentionally select" his victim "because of" her "religion." The offender's bigoted beliefs, denigrating speech and membership in an anti-Semitic organization were unrelated to his decision to rob the victim, who happened to be Jewish. Because these factors were extraneous to victim selection, they fail to hold up as a valid argument for greater penalization. Clearly, the penalty enhancer does not have the effect of punishing the "abstract beliefs" of criminal offenders.

Although the "abstract beliefs" of a defendant may not be considered in sentencing, evidence of racial intolerance may be admitted in a sentencing proceeding where such evidence is relevant to a motive for committing a crime. *Dawson v.*

Delaware, __ U.S. __, __, 112 S. Ct. 1093, 1097-98 (1992). In *Dawson*, the defendant argued that the "Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." *Id.* at 1097. The Court disagreed, replying that "this submission is ... too broad." *Id.* The Court further held that:

> [T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Id. Thus, although "abstract beliefs" are not admissible at sentencing, the fact that expression is protected by the First Amendment does not, alone, prevent its consideration

in sentencing when directly linked to the commission of a crime.

In this case, Mitchell was motivated by racial antipathy. His statements immediately preceeding the battery clearly evidenced this race hatred. Mitchell's words, therefore, were absolutely central to his criminal motivation and are not barred from admission as evidence by the First Amendment.

IV. THE WISCONSIN PENALTY ENHANCEMENT STATUTE IS NOT VIOLATIVE OF THE FIRST AMENDMENT BECAUSE IT DOES NOT PUNISH THOUGHT ANY MORE THAN DO CONSTITUTIONALLY VALID ANTIDISCRIMINATION STATUTES.

The majority in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 817 (1992) attempts to distinguish antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2 and

comparable state statutes from the Wisconsin penalty enhancer. The majority argues that antidiscrimination statutes punish a discriminatory act, whereas the Wisconsin statute punishes "selection." *Id.* at 816-17. "Selection," in the court's mind, is not an objective act but, rather, a "subjective mental process." *Id.* The court therefore concludes that the penalty enhancer criminalizes subjective bigoted thought in violation of the First Amendment. *Id.*

Far from creating an Orwellian thought crime, the Wisconsin law punishes the act of discrimination in the context of criminal activity. As discussed earlier, intentional selection of a crime victim because of that person's race, religion or other noted characteristic is an act of

discrimination based on biased thought. Discrimination in the selection of a victim is no more of a thought and no less of an action than is discrimination in employment, housing, or any other area. Private deliberations that preceed the intentional selection of a victim because of that person's race are protected thought just as are private deliberations that preceed the firing of an employee because of that worker's race. But responding to such thoughts by either criminally victimizing or firing a person on account of the individual's race is an act of discrimination which may be punished consistent with the First Amendment.

Inherent in all acts of discrimination are preceeding discriminatory thoughts which, in

essence, get punished by antidiscrimination laws. To the extent that bigoted thoughts underlying the act of discrimination are, in effect, punished when discrimination is made illegal, the interference with thought is only incidental to the government's larger purpose of sanctioning unprotected conduct. The Wisconsin penalty enhancer does not punish prejudicial thought any more than do antidiscrimination laws that prohibit hiring or firing because of race, religion and the like. Just as the words of the alleged discriminator may be used to prove violations of antidiscrimination statutes, the words of the criminal offender may be used as circumstantial evidence to prove discrimination in the victim selection process. Both the Wisconsin statute and other antidiscrimination laws

punish the act of discrimination. They do not penalize the underlying thought, which is only incidentally affected, nor the speech, which is merely used to prove biased conduct. The only difference between the Wisconsin statute and other constitutionally valid laws prohibiting discrimination is the context in which the discrimination is penalized.

CONCLUSION

For the foregoing reasons, this amicus repectfully urges this Court to reverse the decision of the Wisconsin Supreme Court and uphold the constitutionality of the Wisconsin penalty enhancement statute section 939.645.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

vs.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a statute increasing the penalty for battery when the victim is selected because of his race violate the First Amendment?

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R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1982) .. 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

vs.

TODD MITCHELL,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system. CJLF seeks to defend the rights of victims of crime and the law-abiding public to a criminal justice system which will effectively enforce the law and administer the punishment necessary to protect society.

The present case involves a claim that the First Amendment limits the authority of the state to consider an especially pernicious *mens rea* when fixing the punishment for a crime of violence, even though the statute regulates neither expression nor expressive conduct. Such a rule would detract from the ability of the state to apportion the punishment to the crime, and it would call

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1. Both parties have consented in writing to the filing of this brief.

into question many practices in sentencing and admission of evidence which are presently unquestioned. These effects are contrary to the interests of victims and society which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

The facts of the case are undisputed and are stated in the opinion of the Wisconsin Supreme Court, *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (1992). A group of young black men and boys, at the direction of defendant Todd Mitchell, severely beat 14-year-old Gregory Reddick, selecting him because of his race. Gregory may have suffered permanent brain damage. The group was angered by the depiction of racially motivated violence by whites against blacks in the movie "Mississippi Burning."

Mitchell was convicted of aggravated battery, which is normally punishable by a maximum of two years. Mitchell received an increased sentence of four years because of his intentional selection of Gregory on the basis of race. *Ibid*.

The court of appeals affirmed. It rejected vagueness and overbreadth challenges and held an equal protection challenge to be procedurally barred. *Id*., at 808. The Wisconsin Supreme Court reversed on First Amendment grounds, *ibid*., and did not discuss the equal protection or vagueness claims, *id*., at 809, n. 2.[2]

SUMMARY OF ARGUMENT

The First Amendment has no application to this case. The statute in question does not regulate speech, expressive conduct, or conduct commonly associated with expression.

The consideration of motive for a criminal act in establishing the sentence for that act does not violate the First Amendment. Numerous criminal statutes consider motive, including juror and witness retaliation laws, civil rights laws such as 18 U. S. C. § 241, and capital sentencing laws. In the latter context, the Constitution has been construed to *require* consideration of motive in sentencing.

The statute is not unconstitutionally overbroad. The overbreadth doctrine is inapplicable to statutes which do not regulate expression. If there is any overbreadth, it is not substantial. There is little, if any, "chilling effect" on speech from the evidentiary use of speech to prove the *mens rea* of this offense. If there is any chilling effect, it is insufficient to invalidate the statute.

A vagueness challenge cannot be sustained in this case. The statute is not vague as applied to the facts of this case.

2. The state court of appeals holding that the equal protection claim is barred is therefore the last state court opinion on the issue. Cf. *Ylst* v. *Nunnemaker*, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991).

ARGUMENT

I. Violence is not speech.

"The First Amendment does not protect violence." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 916 (1982). This point is so simple and obvious that one would think it unnecessary to even mention, much less brief. Yet the opinion of the Wisconsin Supreme Court in the present case makes it necessary. The court below has applied the First Amendment to a statute which punishes an act of violence combined with a *mens rea* but which contains no element of expression or expressive conduct. Such a staggering expansion of the First Amendment must be confronted head-on.

The opinion below is, in large part, a misapplication of *R.A.V.* v. *St. Paul*, 120 L. Ed. 2d 305, 112 S. Ct. 2538

(1992). The ordinance at issue in *R.A.V.* was direct regulation of expression, prohibiting the placement of "a symbol, object, appellation, characterization or graffiti" of certain proscribed content. *Id.*, 120 L. Ed. 2d, at 315, 112 S. Ct., at 2541 (quoting Minn. Legis. Code § 292.02 (1990)).

There is a fundamental difference between expression which has traditionally been excluded from First Amendment protection, on the one hand, and conduct which is not "speech" at all, on the other. The former category includes "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); obscenity, *Roth* v. *United States*, 354 U. S. 476, 486 (1957); and child pornography, *New York* v. *Ferber*, 458 U. S. 747, 763 (1982). *R.A.V.* holds that within these categories, a state may not prohibit those expressions it opposes while permitting those proscribable expressions it favors. 120 L. Ed. 2d, at 317-320, 112 S. Ct., at 2542-2545. "Where the statute is directed at conduct rather than speech," however, see *id.*, 120 L. Ed. 2d, at 322, 112 S. Ct., at 2546, we have a horse of an entirely different color. Characterization of the latter category " 'as not being speech at all' " is not "shorthand"; it is "literally true." Cf. *id.*, 120 L. Ed. 2d, at 318, 112 S. Ct., at 2543.

The present case involves the crime of aggravated battery with a penalty enhancement under Wis. Stat. § 939.645. The validity of the battery statute is unchallenged, while the penalty enhancer applies to a person who "[i]ntentionally selects the [victim] . . . because of the race . . . of that person . . . ." *Id.*, subd. (1)(b).[3] Neither the underlying statute nor the penalty enhancer mentions

3. For brevity, we will refer only to selection by race for the remainder of this brief. The statute includes several other classifications.

any form of expression, unless one considers violence to be a form of expression.[4]

If *R.A.V.* really stood for the radical proposition adopted below, it would be necessary to overrule it and adopt instead the theory of the concurring Justices in that case.[5] To avoid such an absurd extrapolation of *R.A.V.*, it is necessary to stake out the outer boundaries of expression.

In *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), this Court declared that it "cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." However, the Court assumed "that the alleged communicative element in O'Brien's conduct is sufficient *to bring into play the First Amendment*," *ibid.* (emphasis added), and proceeded to promulgate the four-part *O'Brien* test, *id.*, at 377.

Thus, the spectrum of speech to conduct is divided into three regions. "Pure speech" in a public forum cannot be prohibited in the absence of a compelling government interest; only time, place, and manner regulation is permitted. *United States* v. *Grace*, 461 U. S. 171, 177 (1983). For those types of conduct which are sufficiently expressive to bring into play the First Amendment, the four-part *O'Brien* test applies. Where the expressive component of the conduct is insufficient, the First Amendment is simply inapplicable.

4. Mitchell posits a hypothetical of the enhancement provision increasing a sentence for disorderly conduct consisting of "fighting words." Brief in Opposition 11. Whether the rule in *R.A.V.* precludes application of the enhancement to such a crime is a question which can await a case which presents it. This point is discussed further under "overbreadth," part III, *post*, at 23-24.

5. The overbreadth analysis of Justice White's opinion would not apply to this statute, for the reasons discussed in part III, *post*, at 22-23.

The sufficiency of the expressive component was rather obvious in most of the succeeding "expressive conduct" cases. Many cases involved public protests. See *Texas* v. *Johnson*, 491 U. S. 397, 399 (1989) (flag burning); *United States* v. *Eichman*, 496 U. S. 310, 312 (1990) (same); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 291-292 (1984) (sleeping in park to demonstrate plight of homeless); *Spence* v. *Washington*, 418 U. S. 405 (1974) ("peace symbol" taped on flag). Other cases involved conduct which was engaged in solely for the purpose of being seen by others, with no other direct consequence. See *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 86 (1977) ("for sale" signs); *Barnes* v. *Glen Theatre, Inc.*, 115 L. Ed. 2d 504, 509, 111 S. Ct. 2456, 2458 (1991) (nude dancing).

The *Barnes* case is particularly instructive in marking the outer limit of First Amendment protection of conduct. The plurality states that nude dancing "is expressive conduct within the *outer* perimeters of the First Amendment, though we view it *as only marginally so*." 115 L. Ed. 2d, at 511, 111 S. Ct., at 2460 (emphasis added). Justice Scalia, who later wrote *R.A.V.*, flatly denied that nudity regulation was "subject to a First-Amendment scrutiny at all." *Id.*, 115 L. Ed. 2d, at 515, 111 S. Ct., at 2463 (concurrence in the judgment). Justice Souter agreed that nude dancing "is subject to a degree of First Amendment protection," but only after carefully distinguishing other types of dancing and other circumstances of nudity. *Id.*, 115 L. Ed. 2d, at 521, 111 S. Ct., at 2468 (concurrence in the judgment). This discussion appears to concur with the plurality's characterization of nude dancing as within the limits of protection, but only marginally.

A number of other cases have rejected First Amendment claims on the ground that the conduct in question was simply beyond the boundary of what can be considered "speech." In *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986), the district attorney closed down an "adult" bookstore for knowingly permitting lewd acts on the premises. *Id.*, at 698-699. The New York Court of Appeals had applied the *O'Brien* test because "the closure order . . . would also impose an incidental burden on [the owners'] bookselling activities." *Id.*, at 704-705.

This Court emphatically reversed. The conduct in the case "manifests absolutely no element of protected expression." *Id.*, at 705. The *O'Brien* test "has no relevance to a statute directed at imposing sanctions on nonexpressive activity." *Id.*, at 707. Justice O'Connor, joined by Justice Stevens, concurred, saying that "a First Amendment standard of review" does not apply "where as here, the government is regulating neither speech nor an incidental, nonexpressive effect of speech." *Id.*, at 708.

FTC v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990) is similar. The trial lawyers boycotted indigent criminal defense appointments in order to force an increase in pay. *Id.*, at 416. The FTC decided that the boycott was an illegal restraint of trade. *Id.*, at 418-419. The Court of Appeals applied an analysis derived from *O'Brien*, *id.*, at 429, and this Court reversed.

One of the "critical flaws" in the lower court's analysis was that "it exaggerates the significance of the expressive component" of the trial lawyers' action. *Id.*, at 430. This Court acknowledged that the boycott did have an expressive component, as does every boycott, *id.*, at 434, but nonetheless held that the *per se* rule of illegality applied. *Id.*, at 436. The majority then applied straight antitrust analysis, *id.*, at 434-436, and not the special rules applicable to First Amendment cases. Cf. *id.*, at 440 (Brennan, J., dissenting). Implicit in the rejection of the dissent's argument is the conclusion that this was not a First Amendment case. The trial lawyers' boycott was primarily an act of economic coercion, even though it had some expressive component, and the First Amendment was therefore inapplicable. The majority distinguished

Claiborne Hardware Co., *supra*, on the basis of the political object of the boycott in that case. *Id.*, at 426-427.

Dallas v. *Stanglin*, 490 U. S. 19 (1989) also considered the magnitude of the expressive component of the conduct in question, "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.*, at 25. Associating for the purpose of recreational dancing was therefore not "the sort of expressive association that the First Amendment has been held to protect." *Id.*, at 24. The first question to be asked in the present case is whether any more than a kernel of expression is involved here. If not, this is simply not a First Amendment case.

Lakewood v. *Plain Dealer Publishing Co.*, 486 U. S. 750 (1988) laid the foundation for *R.A.V.*'s holding that a state may not selectively prohibit, on the basis of content, expressive conduct which it could ban altogether. *Lakewood* involved a facial challenge to an ordinance giving the mayor "unbridled discretion over which publishers may place newsracks on public property and where." *Id.*, at 753.

A facial challenge based on merely potential censorship lies only if the regulation governs "expressive activity." *Id.*, at 755; *id.*, at 776 (White, J., dissenting). The threshold question, on which the Court divided 4-3 (two Justices not participating), was whether the case involved "activity protected by the First Amendment" at all. See *id.*, at 784 (White, J., dissenting). The majority found that it did, phrasing the test this way: "The law must have a close enough nexus to *expression*, or to conduct *commonly associated with expression*, to pose a real and substantial threat of the identified censorship risks." *Id.*, at 759 (emphasis added). The "commonly associated" category seems to include those acts generally employed to "get the word out," such as placing newsracks, selling pamphlets, see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943), and picketing, see *Police Department of Chicago* v. *Mosely*, 408 U. S. 92, 97-98 (1972).

The penalty-enhanced crime in the present case consists of three parts: the act of aggravated battery; the *mens rea* required for that crime generally; and the mental process of choosing a victim on the basis of race. None of these elements has any more than the kernel of expression found insufficient in numerous cases.

Just as being nude in public, "without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances," *Barnes* v. *Glen Theatre, Inc.*, 115 L. Ed. 2d, at 521, 112 S. Ct., at 2468 (Souter, J., concurring in the judgment), so beating up a person because of his race, without more, expresses nothing beyond the view that such action is somehow justifiable. The underlying reason may be misdirected anger over past injustices, as in the present case, a racist goal of keeping a given group "in their place," see, *e.g.*, *United States* v. *Guest*, 383 U. S. 745, 747 (1966), or the most bizarre delusion imaginable, see *People* v. *Manson*, 61 Cal. App. 3d 102, 129, 132 Cal. Rptr. 265 (1976).[6] These underlying reasons are not expressed by the physical act of violence and the mental act of selecting the victim, which are the elements of the offense. Neither of these elements is "expression," and neither is "conduct commonly associated with expression." Cf. *Lakewood*, *supra*, 486 U. S., at 759.

The state court in the present case committed the same fundamental error as the D.C. Circuit in the *Trial Lawyers* case, *supra*: "it exaggerates the significance of the expressive component." 493 U. S., at 430. The

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6. Truth is stranger than fiction. Some wild hypotheticals have been thrown around in this debate, see, *e.g.*, Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?*, 39 UCLA L. Rev. 333, 356 (1991), but none so strange as the true story of the Charles Manson "family."

expression involved here is no greater than the "kernel" found insufficient to invoke First Amendment analysis in other cases. See *Dallas* v. *Stanglin*, *supra*, 490 U. S., at 25; see also *Arcara*, *supra*, 478 U. S., at 707.

The First Amendment and all its associated tests of higher scrutiny are simply inapplicable to this case. Violence is not speech.

II. Consideration of motive in sentencing does not invoke the First Amendment.

A. General Principles.

The statute at issue in the present case deals with discrimination, not motive. *Amicus* CJLF will not brief this point because we understand it will be thoroughly covered in other briefs.

Assuming for the sake of argument that the Wisconsin Legislature *has* chosen to consider motive in setting the punishment for aggravated battery, does such consideration invoke the special scrutiny of First Amendment analysis? *Amicus* submits that it does not. Motive is not expression.

In striking down the present statute, the court below relied heavily on what it called the "insightful analysis" in Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?*, 39 UCLA L. Rev. 333 (1991):

> "The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield. Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts." *State* v. *Mitchell*, 485 N. W. 2d 807, 812 (Wis. 1992) (quoting Gellman, *supra*, at 363).

The errors in this analysis are numerous and serious. First, the offender's purposeful decision to attack a person of a given race certainly is "state of mind." Second, one would have to be a hermit to believe that a racially-motivated assault in America today is not an offense of a different character,[7] just as surely as premeditated murder is different from malicious but unpremeditated murder.

Most egregious of all, however, is the assertion that government's inability to punish thought alone somehow limits government's ability to punish a combination of thought with nonexpressive conduct which carries out that thought. This is nothing less than an attempt to constitutionalize the law of *mens rea*. The attempt should be squarely rejected.

The notion that crime is "constituted only from concurrence of an evil-meaning mind with an evil-doing hand" has deep roots in Anglo-American law. *Morissette* v. *United States*, 342 U. S. 246, 251-252 (1952). While courts were historically unanimous on this central thought, there was great diversity in "their definitions of the requisite but elusive mental element." *Id.*, at 252.

The argument that the government cannot consider "thought" in fixing the degree of the offense or in determining the punishment sweeps far too broadly. Premeditation, for example, is pure thought. It requires that the

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7. "The hate or terrorism element of the crime allows Congress or the states to punish that element more severely because the hate aspect of the crime *affects* both the *harm [caused] by the act* and the likelihood of recidivism by the perpetrator." 4 R. Rotunda & J. Nowak, *Treatise On Constitutional Law* § 20.49, at 351 (2d ed. 1992) (emphasis added).

defendant "did in fact reflect, at least for a short period of time before his act of killing." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 7.7, at 237 (1986). Yet premeditation is a key element of first degree murder in nearly all states which divide murder into degrees. *Id*., at 236. Theorists may debate the wisdom of this division, see *id*., at 241, but its constitutionality is beyond question.

One can quote learned authorities for the proposition that motive *ought* not be an element of an offense.

> "A defendant's motive, if narrowly defined to exclude recognized defenses and the 'specific intent' requirements of some crimes, is not relevant on the substantive side of the criminal law. On the procedural side, a motive for committing a crime is relevant in proving guilt when the evidence of guilt is circumstantial, and a good motive may result in leniency by those who administer the criminal process." 1 LaFave & Scott, *supra*, § 3.6, at 318.

Yet even this carefully hedged statement is merely a description of what the criminal law has generally been and what the authors think it ought to be. It is not a statement of a constitutional mandate. Nowhere does the Constitution require legislatures to conform to the "better view." See *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967). In circumstances which they deem appropriate, legislatures can and do make motive an element of an offense or a factor in sentencing. Some examples include juror and witness retaliation statutes, civil rights law, and capital sentencing systems.

B. Juror and Witness Retaliation.

Suppose A serves as a juror in B's federal court case and renders a verdict against B. B later assaults A. If B's *reason* for assaulting A was unrelated to the court case, there is no federal interest. The crime is the state offense of assault. On the other hand, if B assaulted A "on account of" the verdict, B has committed a crime

against the United States. 18 U. S. C. § 1503. Such a crime interferes with the operation of the courts by causing future jurors to fear retaliation. The same is true for an assault on a witness "with intent to retaliate" for testimony. 18 U. S. C. § 1513.

The mental element of these crimes is different from those of "specific intent" crimes such as burglary. In burglary, the building is entered as an intermediate step toward some ultimate act, usually theft. See generally *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). In these retaliation crimes, however, there is no ultimate end. The trial is over. The assault has no purpose but vengeance. It is the *reason* for the assault, and only that reason, which makes the assault a federal offense and greatly increases the punishment. Compare 18 U. S. C. § 1513 (10 years + $250,000) with, *e.g.*, Cal. Penal Code § 241(a) (6 months + $1,000).

B is, of course, entitled to think and believe that A's verdict was unjust. Losing litigants generally do. He is even entitled to think and believe that A is a scoundrel who deserves to be beaten. Once he *acts* on that belief, however, his reason becomes the *mens rea* of a criminal offense.

In discussing the statute in the present case, the state court said "The statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." 485 N. W. 2d, at 812 (emphasis in original). This is equally true of the juror and witness retaliation statutes. If the use of the reason for the offense as an element violates the First Amendment, then those statutes are unconstitutional. If not, the statute in the present case does not violate the First Amendment.

C. Civil Rights Laws.

The state court distinguished civil rights laws on the grounds that they punish discriminatory acts, rather than mental processes, and because they impose civil rather than criminal penalties. *Mitchell*, *supra*, 485 N. W. 2d, at 816-817. Even if these distinctions were correct and relevant,[8] the distinctions only account for the 1964 act. The state court's logic fails to distinguish Reconstruction civil rights legislation which has survived over a century of bitter litigation.

Among the surviving legislation of the Reconstruction Era is 18 U. S. C. § 241. This is a criminal statute; violations can be punished by ten years or even life in prison. The statute contains precisely the phrase which the state court found so troublesome in the Wisconsin statute:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or *because of* his having so exercised the same . . . ." 18 U. S. C. § 241 (emphasis added).

The "because of" clause of this statute is not distinguishable from the penalty enhancement provision in the present case. The statute converts what would otherwise be a common offense, usually assault or battery, into a special and severely punished crime, based on the reason the act was committed.

In re Quarles, 158 U. S. 532 (1895) illustrates the "because of" clause. One Henry Worley reported a bootlegger to the federal deputy marshal. In retaliation, Quarles and Butler beat and attempted to murder Worley. *Id.*, at 532-533. The Court held that reporting

8. They are not, but we leave that argument to the state and other *amici*.

a violation of federal law was a right of federal citizenship, and that a conspiracy to injure the citizen "because of" his exercise of that right violated the predecessor of section 241. *Id.*, at 537-538.

The rights which people have and ought to have are controversial subjects. People are entitled to hold and express beliefs that some rights now cognized ought not be rights. Once they conspire to injure a person *because of* that person's exercise of federal rights, however, they commit a federal crime.

The First Amendment applies to the states only through the Fourteenth Amendment. See *Schneider* v. *State*, 308 U. S. 147, 160 (1939). The Radical Republicans who proposed the Fourteenth Amendment also passed the Ku Klux Act specifically for the purpose of protecting people from attacks "on account of their group affiliation." *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (U. S. Jan. 13, 1993) (O'Connor, J., dissenting), part I A. It would be a truly bizarre construction of the Constitution to hold that the Fourteenth Amendments forbids the states to provide the same kind of protection that the Reconstruction Congress itself enacted.

D. Capital Murder.

The most serious crimes have been given the strictest definitions, particularly with regard to the *mens rea*. The fine distinctions are generally to the defendant's benefit, lowering the offense to a noncapital crime (second degree murder or voluntary manslaughter) when the stringent *mens rea* element cannot be proven.

Even in cases of first degree murder, however, this Court has construed the Constitution to require further narrowing. A statute sentencing all first degree murderers to death has been held unconstitutional. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Something more is required, both in narrowing the eligible class and in granting mercy to those within the eligible class. *Lowen-*

field v. *Phelps*, 484 U. S. 231, 246 (1988). That "something more" is often explicit consideration of motive.

Suppose, for example, A and B rape and murder C's young sister. They confess fully, freely, voluntarily, and with evident relish, yet their conviction is reversed because the arresting officer inadvertently skipped one of the *Miranda* warnings while reading the card. Other evidence is insufficient, and A and B "walk." C then kills them both, a capital offense. See, *e.g.*, Cal. Penal Code § 190.2(a)(3).

As deplorable as "taking the law into your own hands" may be, one would need a heart of stone to be unmoved by the powerful mitigating factor of C's motive. The Constitution of the United States, as construed by this Court, not only *permits* consideration of this mitigating factor, it affirmatively *requires* that the sentencer not be precluded from considering the factor. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). The jury must be given instructions which provide a vehicle for such consideration. *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989).

It might be argued that good motive (or at least understandable motive) may be considered in mitigation but not in aggravation. See LaFave quote, *ante*, at 12. In reality, though, there is no difference. Suppose, for example, that Wisconsin punished aggravated battery with a minimum sentence of four years, but with a reduction to two years or less for assaults committed for reasons less harmful to society than the one at issue in this case. The result would be exactly the same: a difference in sentence based on the reason for the assault. Cf. *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (Wis. 1992). That differential is either constitutional or it is not, regardless of whether it is achieved through aggravation or mitigation.

While attempting to distinguish aggravating circumstances in capital cases from "hate crime" penalty enhancement statutes, Gellman distinguishes murder for hire from murder for financial gain. "[M]urder for hire is a different act than other murder; the state is not seeking to punish or deter the motive of profit-seeking, but the medial end of creating contracts to kill." Gellman, *supra*, 39 UCLA L. Rev., at 365.

Gellman's argument proves too much, however. The choice to consider murder for hire, rather than financial gain, as the aggravating circumstance was simply a legislative choice made in Gellman's home state of Ohio. See *ibid*. Other states can and do consider all financially motivated killings to be more evil than killings in anger. "It has been widely recognized that murder for financial gain is an especially vile crime for which the death penalty may appropriately be imposed." *People* v. *Edelbacher*, 47 Cal. 3d 983, 1025, 766 P. 2d 1, 26 (1989); see also *Model Penal Code & Commentaries*, part II, vol. 1, § 210.6, pp. 109-110 (1980). The financial gain circumstance does consider motive. Hence an instruction that motive is not an element would be error if applied to the circumstance rather than the underlying offense. *Edelbacher*, *supra*, 47 Cal. 3d, at 1027, 766 P. 2d, at 27.

A number of states use financial motive, not limited to contract murder, as an aggravating circumstance. See Ala. Code § 13A-5-49(6) (Michie Supp. 1992); Ark. Code Ann. § 5-4-604(6) (Michie Supp. 1991); Del. Code Ann. § 11-4209(e)(1)(o) (Michie Supp. 1992); N.H. Rev. Stat. Ann. § 630:5 VII(i) (Butterworth Supp. 1992); Neb. Rev. Stat. § 29-2523(1)(c) (1989); Utah Code Ann. § 76-5-202(1)(f) (Michie Supp. 1992); Wyo. Stat. Ann. § 6-2-102(h)(vi) (Michie Supp. 1992).

Consideration of racial motive in capital sentencing was approved in *Barclay* v. *Florida*, 463 U. S. 939 (1983). *Barclay* is not distinguishable from the present case in any way favorable to Mitchell. There are differences, but they cut the other way. Barclay, like Mitchell, selected a victim on the basis of his race. *Id*., at 942 (plurality

opinion). Unlike Mitchell, Barclay killed his victim, *ibid.*, engaged in expressive activity, *id.*, at 943, and was sentenced to death, *id.*, at 945.

The sentence of death heightened the degree of constitutional scrutiny applied to the sentencing proceeding. See, *e.g.*, *id.*, at 958-959 (Stevens, J., concurring in the judgment). The court received evidence of notes written and tapes made by the defendants, before and after the crime. *Id.*, at 942-943. This evidence would raise more First Amendment concerns than anything introduced in the present case. The trial judge expressly considered "the racial motive for the murder" in reaching his sentencing decision. *Id.*, at 948.

Barclay is a divided opinion, but there is no disagreement on the point relevant to this case: the judge's consideration of motive was proper. The holding was stated this way in a later majority opinion joined by the authors of both *Barclay* opinions:

> "In *Barclay* . . . we held that a sentencing judge in a capital case *might properly take into consideration 'the elements of racial hatred'* in Barclay's crime as well as 'Barclay's desire to start a race war.' See *id.*, at 949 (plurality opinion); *id.*, at 970, and n. 18 (Stevens, J., concurring in judgment)." *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 316-317, 112 S. Ct. 1093, 1097 (1992) (emphasis added).

Thus, there is no constitutional prohibition against consideration of the racial motivation for a crime in determining the sentence for that crime. What *is* constitutionally required is a *connection* between *mens rea* and the offense.

Dawson, *supra*, clearly illustrates the distinction. Dawson, like Barclay, was a member of a racist gang, 117 L. Ed. 2d, at 315, 112 S. Ct., at 1096, and at least presumably shared the gang's racist beliefs. Unlike Barclay, however, Dawson's racism had nothing to do with the case. *Id.*, 117 L. Ed. 2d, at 317-318, 112 S. Ct., at 1098.

Abstract beliefs and expressive association *alone*, unconnected to any crime or any other relevant sentencing factor, cannot be used to increase a sentence. *Id.*, 117 L. Ed. 2d, at 318, 112 S. Ct., at 1098. Once the connection is made, however, thoughts and their expression can be considered. *Ibid.* Failure to recognize the importance of the connection is the central fallacy of the opinion below.

"Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts." *State* v. *Mitchell*, *supra*, 485 N. W. 2d, at 812 (quoting Gellman, *supra*, at 363). This is a fundamental misunderstanding of the nature of sentence enhancements. The state is *not* punishing the thoughts. It is *considering* the thoughts in determining how severely to punish the *action*. This *Barclay* holds to be constitutional.

E. Recidivism Enhancements.

The recidivist sentencing cases clearly demonstrate the distinction between punishing a factor separately, see *Mitchell*, 485 N. W. 2d, at 815, n. 17, and considering that factor in determining punishment for the act. In *McDonald* v. *Massachusetts*, 180 U. S. 311 (1901), a habitual criminal had been sentenced to 25 years in prison under a statute which applied to persons with two prior convictions. *Id.*, at 311. He claimed double jeopardy. See *id.*, at 313. If the enhancement for the priors were to be examined separately, this objection would be valid. McDonald had already been punished for those offenses.

> "The *fundamental mistake* of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished . . . .
>
> "But it does no such thing . . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal." *Id.*, at 312.

On this principle, the Court rejected the double jeopardy and *ex post facto* claims, *id.*, at 313,[9] and it has continued to reject such claims. *Graham* v. *West Virginia*, 224 U. S. 616, 631 (1912); *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948). The validity of such laws "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); see also *Parke* v. *Raley*, 121 L. Ed. 2d 391, 401-402, 113 S. Ct. 517, 521-522 (1992).

Although invoking a different constitutional provision, the Wisconsin Supreme Court in the present case makes the same "fundamental mistake" as the defendant in *McDonald*. It looks at the sentence enhancement separately and asks, as a matter of federal constitutional law,[10] whether the facts required for the enhancement finding could be punished separately. *Mitchell*, 485 N. W. 2d, at 815, n. 17. Having asked the wrong question, it then produces an irrelevant answer.

Contrary to the state court's assertion, *ibid.*, a penalty enhancement need not stand alone simply because it is an additional or greater punishment rather than a factor to be considered within otherwise allowable sentencing limits. The statute in *Graham*, *supra*, 224 U. S., at 622, imposed an additional five-year term for one prior and a life term for two priors.

Petitioner emphasizes that the penalty enhancement will, in some cases, "all alone" convert a misdemeanor to a felony. Brief in Opposition 17. The answer, again from the recidivist cases, is that the enhancement is not

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9. The Double Jeopardy Clause had not been expressly "incorporated" at that time, but the *McDonald* Court found it unnecessary to even consider that question. *Ibid.*

10. There is no indication in the opinion that it rests on any independent considerations of state law. See *Michigan* v. *Long*, 463 U. S. 1032, 1040-1041 (1983). The Wisconsin court has adopted the federal First Amendment analysis of an Ohio lawyer, published in a California law review, regarding a nationwide model statute.

considered "all alone." Recidivist statutes frequently elevate misdemeanor petty theft to a felony for recidivists, see, *e.g.*, Cal. Penal Code § 666, and the constitutionality of such enhancement is well settled, see, *e.g.*, *People* v. *Tijerina*, 1 Cal. 3d 41, 47, 459 P. 2d 680, 683 (1969).

In short, the lesson of the recidivist cases is this: The state may enhance a sentence for a crime on the basis of facts which it could not punish independently. It makes no constitutional difference whether the enhancement is a separate term, a change in the grade of offense, or a guideline within the statutory range for the underlying offense.

III. The statute is not unconstitutionally overbroad.

The Wisconsin Supreme Court held that the statute in this case "is also unconstitutionally overbroad." *State* v. *Mitchell*, 485 N. W. 2d 807, 815 (1992). On the contrary, it is the state court's interpretation of the overbreadth doctrine that is overbroad.

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). Thus, Mitchell's argument about application of the enhancement statutes to "situations in which the underlying offense openly involves speech," such as disorderly conduct consisting of "fighting words," Brief in Opposition 11, is irrelevant unless the case comes within an exception to the "traditional rule."

The only arguably applicable exception is the overbreadth doctrine. This extraordinary doctrine permits a litigant to attack a statute based on potential application to other people, because of the concern that "it also threatens others . . . who desire to engage in *legally protected expression* but who may refrain from doing so

rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503 (1985) (emphasis added). The scope of the overbreadth doctrine "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, *supra*, 458 U. S., at 769. The overbreadth doctrine is "strong medicine" applied "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973).

The overbreadth doctrine should not be invoked in this case. There is little, if any, constitutionally protected expression involved. The statute, if overbroad at all, is not substantially so. The statute involves only conduct and not "pure speech." It has little or no "chilling effect."

A. Protected Expression.

To apply the overbreadth doctrine under the rationale *Brockett* gives for it, one must identify legally protected expression, *i.e.* expression people have the legal right to engage in, which people may fear they will be prosecuted for under the statute. This cannot be done in the present case, because this statute does not draw any lines between legal and illegal conduct or speech. The statute only fixes the punishment for criminal conduct.

In the First Amendment area, vague statutes are especially disfavored because they inhibit protected expression. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Grayned* v. *Rockford*, 408 U. S. 104, 109 (1972) (internal quotation marks omitted).

Overbroad laws have a similar vice. *Id.*, at 114. Unless narrowed through construction or partial invalidation, see *Osborne* v. *Ohio*, 495 U. S. 103, 112-113 (1990) (narrowing construction); *Brockett*, *supra*, 472 U. S., at 504 (partial invalidation), the existence of the statute will

deter protected, legal expression by people who are uncertain whether the statute will actually be struck down.

With vagueness, the line between the legal and the illegal under the statute is blurred, and legal expression is thereby deterred. With overbreadth, the statute itself straddles the line between legal and illegal, and the legality of speech would turn on the outcome of case-by-case constitutional adjudication if the entire statute were not struck down. "The crucial question, then, is whether the ordinance *sweeps within its prohibitions what may not be punished* under the First and Fourteenth Amendments." *Grayned*, *supra*, 408 U. S., at 114-115.

The statute in the present case does not prohibit any protected expression. A person who limits himself to protected expression will never be in jeopardy of a sentence enhancement, because there is no underlying sentence to enhance. The overbreadth doctrine is therefore inapplicable.

B. Substantial Overbreadth.

The overbreadth doctrine is applied most vigorously to statutes regulating "pure speech." Conversely, its function attenuates as the behavior in question moves toward conduct. *Broadrick*, *supra*, 413 U. S., at 615. The present case involves conduct and the *mens rea* associated with that conduct and little, if any, speech. If the overbreadth doctrine applies at all, the statute would have to be substantially overbroad to be invalid. *Ibid.*; *Ferber*, *supra*, 458 U. S., at 770.

The penalty enhancer applies to the underlying offenses set forth in ten chapters of the Wisconsin criminal law. Wis. Stat. § 939.645(1)(a). To invoke the rule of *R.A.V.*, Mitchell plucks out a handful of sections where the underlying offense may consist of speech rather than conduct. Brief in Opposition 11. Even assuming for the sake of argument that *R.A.V.* would preclude enhancement of these "speech crimes" on the basis of content,

these limited examples do not render the statute substantially overbroad. These are "marginal applications," and "the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' " *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) (quoting *CSC* v. *Letter Carriers*, 413 U. S. 548, 580-581 (1973)). The overbreadth doctrine does not apply to such statutes.

C. "Chilling Effect" and Speech Evidence.

Of all the errors in the majority opinion, one stands above all others in its breathtaking potential to wreak havoc in the criminal law. This is the assertion that the statute is unconstitutional because speech will often be used as evidence of the racially discriminatory selection, thereby "chilling" protected expression. *State* v. *Mitchell*, *supra*, 485 N. W. 2d, at 815-816.

It is hornbook law that "[t]he motive with which an actus reas was committed is always relevant and material." R. Perkins & R. Boyce, *Criminal Law* 928 (3d ed. 1982) (footnotes omitted); see also 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.6, at 318 (1986). Indeed, one court went so far as to hold that, absent extremely strong evidence of planning activity, evidence of motive was essential to proof of premeditation, and a conviction of first degree murder would be reversed for insufficiency of evidence without it. *People* v. *Anderson*, 70 Cal. 2d 15, 27, 447 P. 2d 942, 949 (1968).[11]

Motive, intent, and premeditation are often proved by the defendant's speech. This evidentiary use of speech does not render consideration of these mental states unconstitutional. The state court was concerned that a thug's use of a racial epithet would be used against him.

11. The California Supreme Court has since backed away from this categorical statement, *People* v. *Perez*, 2 Cal. 4th 1117, 1125, 831 P. 2d 1159, 1163 (1992), but motive evidence remains extremely important.

Mitchell, *supra*, 485 N. W. 2d, 816. These epithets may be constitutionally privileged when not part of a crime, but they stand on no higher plane than such statements as "I hate Joe Smith." Yet no one doubts that the latter statement would be admissible on the issues of intent and premeditation in the murder of Joe Smith. A mental element of a crime is not unconstitutional simply because it is proved by defendant's speech.

If there is one definition of a crime that is unquestionably constitutional, it is the one contained in the Constitution itself. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U. S. Const. art. III, § 3. If an interpretation of another part of the Constitution would render this definition unconstitutional, then that interpretation must be wrong.

Haupt v. *United States*, 330 U. S. 631 (1947) is one of the few treason cases to reach this Court. Hans Haupt was the father of a German saboteur and gave him aid and comfort. The major question was whether he did so out of "parental solicitude" or out of "adherence to the enemy." *Id.*, at 641. Only the latter is treason. In support of the verdict, the Court noted

> "the evidence of defendant's own statements that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect . . . ." *Id.*, at 642.

The *Haupt* Court was sensitive to the First Amendment problems. "Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government . . . . But these statements were explicit and clearly were admissible on the question of

intent *and adherence to the enemy.*" *Ibid.* (emphasis added).

In other words, even at the solid core of the First Amendment—political disagreement with the government—speech is properly considered as evidence of *mens rea* when it is sufficiently connected with the crime.

The "adherence" element of treason is no less likely to chill protected speech than the "because of" element of the present statute. The state court seriously overestimated the chilling effect of the statute and seriously underestimated the degree of "chill" necessary to invalidate a statute.

> "It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses." *Mitchell*, 485 N. W. 2d, at 816 (quoting Gellman, *supra*, 39 UCLA L. Rev., at 61 (emphasis in original)).

This is a gross and patent overestimation of the "chilling effect." A person could only be "chilled" by the potential evidentiary use of his statements if he perceived a significant probability that he would be prosecuted. A person who has no intention of ever committing an underlying offense would not perceive such a probability. The chilling effect does *not* extend to the entire populace. Indeed, it is painfully evident today that racist speakers freely and frequently express their views, see, *e.g.*, *Forsyth County* v. *Nationalist Movement*, 120 L. Ed. 2d 101, 108, 112 S. Ct. 2395, 2398 (1992), despite the existence of hate crime legislation in nearly every state, see *Mitchell*, 485 N. W. 2d, at 811. Similarly, during the Vietnam War, it was equally evident that persons sympathetic to the other

side freely expressed that opinion without fear that it would be used against them in a prosecution for treason.

In short, it *is* an answer that one need only refrain from committing the underlying offense. One who has absolutely no intention of ever committing such an offense is not "chilled."

This Court addressed the degree of "chill" needed to invalidate a statute in *Younger* v. *Harris*, 401 U. S. 37 (1971). That case involved a state "criminal syndicalism" statute with much more serious implications for free speech than the statute at issue in the present case.[12] Even in this context, however, the Court cautioned against excessive reliance on "chilling effect."

> "[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Id.*, at 51.

We have already demonstrated that the effect on speech is minor. The need for hate crime legislation is ably set forth in other briefs filed in this case. All that remains is the lack of alternatives.

The Wisconsin Legislature has determined that aggravated battery upon a victim selected because of his race needs to be punished by a sentence of up to seven years. *Mitchell supra*, 485 N. W. 2d, at 809. This assessment of the needed punishment is surely within the

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12. Among other things, the directly prohibited teaching and advocacy of "criminal syndicalism." *Id.*, at 38, n. 1.

legislative competence. See *Harmelin* v. *Michigan*, 115 L. Ed. 2d 836, 860-861, 111 S. Ct. 2680, 2698 (1991) (opinion of Scalia, J.); *id.*, 115 L. Ed. 2d, at 867, 111 S. Ct., at 2703 (opinion of Kennedy, J.). If this cannot be accomplished by raising the penalty for "hate crime" aggravated battery alone, the only other way is to raise the penalty for *all* aggravated battery. That is not a feasible alternative.

The fact that aggravated battery can be punished without the enhancement does not make the enhancement unnecessary, and simply repealing the enhancement is not an alternative. To make the punishment fit the crime, including the especially pernicious *mens rea* involved in this case, the enhancement provision is necessary.

The "chilling effect" in this case is thus no greater than that which exists in the definitions of numerous unquestioned criminal laws. It is insufficient to warrant striking down this statute.

IV. A vagueness challenge cannot be sustained in this case.

The contention that the statute is unconstitutionally vague is easily disposed of. The statute is crystal clear as applied to Mitchell's conduct in the case before the Court. Mitchell and his group had the specific purpose to beat someone because of his race, and they did so. *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (Wis. 1992).

Unlike overbreadth, a vagueness challenge may only be made on the facts of the present case. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

CONCLUSION

The decision of the Wisconsin Supreme Court should be reversed.

January, 1993

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF WISCONSIN,

PETITIONER,

v.

TODD MITCHELL,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WISCONSIN

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QUESTION PRESENTED

Does the First Amendment prohibit states from providing greater maximum penalties for crimes if the fact-finder determines that the criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion, or other specified status?

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SUMMARY OF THE ARGUMENT

1. This is a sentencing case. Unlike the ordinance at issue in *R.A.V.* v. *City of St. Paul, Minnesota*, __U.S.__, 112 S.Ct. 2538 (1992), the Wisconsin sentencing enhancement statute criminalizes nothing.

2. This Court has emphasized again and again that the sentencing process requires a broad inquiry by the sentencing authority into both the qualities of the crime and those of the criminal.

3. The rule announced by the Wisconsin Supreme Court in the opinion below would greatly undermine the ability of sentencing authorities to inquire into the moral and motivational qualities of criminals in the sentencing process.

4. The decision of the Wisconsin Supreme Court is contrary to the precedents of this Court, which has held that the racial motivation of a crime is relevant to sentencing for that crime.

5. The decision below is not only contrary to the precedents of this Court, it is contrary to reason. Not even those legal philosophers most anxious to separate the law from morality would argue that the moral qualities of a criminal should be ignored at sentencing.

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BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WISCONSIN

Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Gil Garcetti, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States.

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INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State of California, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter -- which raises the issue of the constitutionality of a sentencing enhancement based upon the ethnic, religious or other group affiliation -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. In particular, California has enacted "hate crimes" statutes, California Penal Code sections 422.6, 422.7, 422.75 and 11411, the validity of which may be placed at issue by this Court's resolution of the case at bar.

It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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THIS IS A SENTENCING CASE, AND THIS COURT HAS REPEATEDLY EMPHASIZED THAT THE RACIAL MOTIVATION OF A CRIME IS A LEGITIMATE FACTOR IN SENTENCING FOR THAT CRIME

This is a sentencing case. The Wisconsin statute permits the sentencing authority to impose a longer prison term or a higher fine, where a crime is committed "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wisconsin Stats. sec. 939.645(1)(b). The statute criminalizes nothing. Everything that it covers is already criminal. And, the constitutionality of the underlying crimes is not questioned and is not at issue in the instant case.

1. *R.A.V. v. City of St. Paul, Minnesota* distinguished.

As such, the statute in the instant case is to be distinguished from the St. Paul ordinance at issue in *R.A.V. v. City of St. Paul, Minnesota*, __U.S.__, 112 S.Ct. 2538 (1992). In that case, a divided Court recently ruled that the particular hate-crime ordinance involved was unconstitutional under the First Amendment. The first distinction to be noted between the two statutes has already been alluded to: The St. Paul ordinance criminalized symbolic actions merely because they caused "anger, alarm or resentment." *Id.* at 112 S.Ct. 2559. By contrast, the Wisconsin sentencing enhancement creates no new crime or crimes. Every act or expression which was legal before the act was passed remains legal, no matter how heinous or revolting it might be to others.

The other side of this distinction is that, while the Wisconsin statute protects more people than did the St. Paul ordinance -- protecting alike majorities as well as minorities, as the facts of the present case illustrate -- the Wisconsin statute is more narrowly circumscribed so as to avoid the overbreadth problems inherent in the St. Paul ordinance. Specifically, the four-member minority in *R.A.V.* found that the statute in that case "criminalizes a substantial amount of expression that -- however repugnant -- is shielded by the First Amendment." *Id.*, at 112 S.Ct. 2559. The Wisconsin sentencing enhancement does no such thing. The object of the Wisconsin statute is ordinary

crime, not expressive conduct of any sort. Overwhelmingly, we are speaking of common crimes against persons and property. As such, the Wisconsin law, already tailored to the needs of protecting the security of the citizenry, is particularly inappropriate for the sweeping application of overbreadth analysis, such as applied in *R.A.V.* As this Court explained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), in setting forth the test for facial invalidity:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function . . . attenuates as the otherwise unprotected behavior . . . moves from "pure speech" toward conduct and [when] that *conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws* . . . .

Id., at 615 [emphasis added].

In sum, whereas *R.A.V.* sought to make criminal acts which were merely repugnant, the Wisconsin sentencing enhancement creates no new crimes. Actions, expressive or not, which were legal before remain legal now. Furthermore, the Wisconsin statute, even were it less than perfectly fitted to the task, is particularly inappropriate for application of the overbreadth analysis applied by the four-member minority in *R.A.V.*

2. Sentencing is a process demanding broad inquiry into the characteristics of both the criminal and the crime.

This Court has repeatedly emphasized that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material." *Payne v. Tennessee*, 111 S.Ct. 2597, 2606 (1991). As the Court put it in *United States v. Grayson*, 438 U.S. 41 (1978):

> "[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."

Id., at 50, quoting from *United States v. Tucker*, 404 U.S. 443, 446 (1972).

Thus, at a time when indeterminate sentencing regimes were popular, this Court distinguished between the evidentiary limitations upon findings of guilt and the wide discretion long implicit in the sentencing process:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> . . . . [¶]
>
> Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Williams v. People of State of New York, 337 U.S. 241, 246-47 [footnotes omitted].

The more recent trend towards determinate sentencing regimes is also consistent with constitutional principles, whether it takes the form of strictly specified sentences, mandatory sentencing guidelines or -- as in the case of the Wisconsin sentencing enhancement -- discretionary sentencing factors. See *Chapman v. United States*, __U.S.__, 111 S.Ct. 1919 (1991) [mandatory sentencing enhancement]; *Mistretta v. United States*, 488 U.S. 361 (1989) [federal sentencing guidelines].

3. The approach advocated by the majority of the Wisconsin Supreme Court would turn our sentencing system on its head.

Although the majority of the Wisconsin Supreme Court seems unaware of it, the implications of the logic of the lower court decision upon sentencing law and practice would be

profound. If allowed to stand, it would essentially erect the First Amendment as a barrier between the sentencing judge and the necessarily wide-ranging inquiry appropriate to a just sentencing regime. The keystone of the Wisconsin court's decision is its notion that "[t]he First Amendment protects not only speech but thought as well." *State v. Mitchell*, 485 N.W.2d 807, 811. This notion leads the majority below to conclude that the defendant was being punished "because of" his motives in committing the crime, and because his motives implicated his thoughts, therefore he was being punished for his thoughts in violation of the First Amendment.

But surely this argument proves too much. Contrary to the Wisconsin majority, motives are often of great relevance to a court's imposition of sentence. For example, in California, there are statutes which expressly provide that motivation may constitute an aggravating factor supporting imposition of the death penalty. (See, e.g., California Penal Code section 190.2(a)(1), providing for imposition of the death penalty in the case of murders "carried out for financial gain.") Just as motive is relevant evidence in determining the guilt of a defendant, so it is relevant in considering the moral blameworthiness of the defendant at sentencing. That his motives -- or, "thoughts" -- are relied upon as evidence of that moral blameworthiness no more implicates the First Amendment than does admission of a confession at trial.[1]

But the problems with the approach taken by the court below do not end here. If motive implicates "thought," which is protected by the First Amendment, then factors such as a defendant's remorse or lack of remorse -- which, after all, are "thoughts," or, at least, attitudes -- would be rendered protected by the First Amendment and therefore beyond the bounds of consideration. Presumably, efforts by a judge to base a mitigated sentence upon a defendant's devout religious beliefs, commitment to family values or belief in the Protestant work ethic would

1. As the Court noted in *Street v. New York*, 394 U.S. 592 (1969): "Assuming that . . . a conviction would otherwise pass constitutional muster, . . . nothing would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way. *Id.*, at 394 U.S. 596; accord *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

similarly be an intrusion upon First Amendment values, according to the Wisconsin majority. Conversely, a defendant's dissolute character, his personal commitment to the brutal extermination of his enemies, or his contempt for the value of human life in general could not be considered as permissible grounds for imposition of an aggravated sentence.

The problem with the Wisconsin Supreme Court's conception is not that beliefs are unprotected by the First Amendment, but that it is the *expression* of those beliefs which implicate Constitutional protection, and that, even then, such expression does not implicate First Amendment protection within the context of the judicial process, including sentencing. There can be no doubt, for example, that a sentencing enhancement inviting imposition of a stiffer sentence upon Republicans would violate the First Amendment. But such a law would run afoul of the First Amendment not because it punishes thought but because it singles out a particular, presumably unpopular viewpoint, to the exclusion of other, contrary values.

By contrast, it should be noted that the Wisconsin statute is both symmetric and all-inclusive in its operation. That is, in the former regard, the statute is not designed to protect particular ethnic, religious or other groups; on the contrary, it is designed to protect all such groups. As the instant case amply illustrates, this law protects members of the majority afflicted by racial, religious, etc., attacks as much as it protects members of insular minorities. It does not play favorites. In this sense, it is "symmetrical" amongst the various groups addressed by the statute.

But the statute at issue is not only symmetrical; it is also, with one clearly-permissible exception (discussed below), all-inclusive. As noted, the statute expressly protects victims of crimes committed "because of race, religion, color, disability sexual orientation, national origin or ancestry. . . ." sec. 939.645, Mich. Stats. The fact is that everyone has a race, a color, a sexual orientation, a national origin or ancestry and a "religion," if one but allows that agnostic or atheist views are also religious opinions, within the meaning of the statute.

As noted, there is one exception to the complete all-inclusiveness of the Wisconsin statute. That is its specification of special severity of possible sentence based upon "disability." But physical (or mental) disability is demonstrably a condition -- well

acknowledged and historically confirmed -- which justifies particular consideration in imposition of a severe sentence in cases involving disabled victims of crime. It hardly requires sociological data or population surveys to appreciate that a person who is in a wheel-chair or who is blind may be an especially attractive target for criminal attack and therefore may be an especially vulnerable victim worthy of particular protection. Criminal statutes of this nation have long accorded special protection to the demonstrably vulnerable. In California, for example, we have statutes which protect persons over 65 years of age, by adding a sentencing enhancement based upon the age of the victim. See California Penal Code section 1203.09. This clearly reflects heightened concern for the vulnerability of such elderly victims. Similarly, there can be no reasonable doubt that statutes giving special protection to children from sexual and other abuse are constitutional. Because children are particularly vulnerable to such abuse, we have long provided special protections for them in the form of specialized criminal statutes and sentencing schemes. See, e.g., California Penal Code section 288.

4. The lower court's ruling is manifestly contrary to Constitutional precedent.

The lower court's decision in the case at bar is not only contrary to the general tenor of the constitutional law governing sentencing. It is manifestly contrary to constitutional precedents. This Court has expressly held that the racial motivation for a crime is a valid ground for imposing an aggravated sentence, *Barclay v. Florida*, 463 U.S. 939, 949-50 (1983), a view reaffirmed unanimously by the Court just last term in *Dawson v. Delaware*, 112 S.Ct. 1093, 1097 (1992).[2]

In *Barclay*, petitioner and his cohorts set out with the apparent purpose of indiscriminately killing white persons,

2. Although Justice Thomas dissented from the judgment, he left no doubt that he supported the majority's conclusion in this regard. In fact, from all appearances, he would have gone further than the majority. (See 112 S.Ct. at 1100-05.)

thereby provoking a racial war. In furtherance of this cause, they killed a white hitchhiker in Florida. Petitioner was convicted of first-degree murder, and the jury recommended life imprisonment. But the sentencing judge overruled the jury's recommendation and sentenced petitioner to death, based in part upon the "nonstatutory aggravating circumstance of racial hatred." 463 U.S. at 949. On review, this Court rejected petitioner's argument that this was error:

> The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors.

Ibid.

In *Dawson v. Delaware*, *supra*, the Court rejected -- on First Amendment grounds -- reliance upon membership in a racist organization where that had *no* relevance to the offense committed. But, in so doing, the Court expressly reemphasized its commitment to the principle adopted in *Barclay*:

> In *Barclay*, . . . the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder."

Dawson v. Delaware, supra, at 112 S.Ct. 1098 [citation omitted].

The Wisconsin statute at issue in the instant case is demonstrably consistent with the principle announced in *Barclay* and reaffirmed in *Dawson*. Under the Wisconsin statute, the racial, religious, etc., motivation of the crime is necessarily directly relevant to the reason behind the crime itself: The statute prescribes that the crime must have been committed "because of" the race, religion, etc., of the victim. In effect, the statute amounts to a determination by the Wisconsin legislature that the sentencing authority ought to be free and be encouraged to consider the racial, religious, etc., motivation of a crime as a general matter. It renders consideration of the racial, religious, etc., motivation of the crime systematically subject to consideration of the sentencing judge, rather than leaving such consideration to ad hoc application. It does not *require* a

sentencing judge to impose a higher term. It merely gives him the option of imposing an aggravated sentence if a specific finding is made by the trier of fact -- just as the finding of aggravation based on the racial motivation of the crime permitted the judge in *Barclay* to impose the death penalty.

Certainly, there would seem to be no reason to believe that the limits upon a sentencing judge in non-death-penalty cases should be *more restrictive* than the limits applicable to imposing the death sentence, as in *Barclay*. It follows that the Court can hardly strike down the Wisconsin enhancement statute without raising serious doubts about the continuing viability of the rule of *Barclay* and *Dawson*, *supra*. This in turn would threaten to cripple -- and would certainly chill -- the ability of prosecuting authorities to introduce evidence relating to a whole host of issues concerning to the defendant's actions or character traits, regarding race, religion, etc., etc, most notably at penalty-phase trials in death penalty cases. Such a ruling would, at the very least, fundamentally undermine this Court's commitment to making death penalty penalty-phase trials into a fair fight. *Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

5. The extreme restrictions proposed by the Wisconsin Supreme Court are contrary to the conceptions even of those legal philosophers most anxious to separate law from morality.

Such draconian restrictions upon the range of a sentencing judge's discretion as have been proposed by the Wisconsin Supreme Court are not only contrary to our common law and constitutional traditions; they are also contrary to reason and logic. Even those legal philosophers most anxious to separate law from morality have not sought to deny the relevance of a defendant's thoughts, motivations, attitudes and other moral qualities to the imposition of sentence. The famous positivist H. L. A. Hart, for example, was at great pain to emphasize the relevance of such factors to sentencing. Replying to accusations that positivists might not consider such moral factors in affixing punishment without inconsistency, Hart answered that

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> [t]here are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice or fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike.

H.L.A. Hart, *Law, Liberty and Morality* 36-37 (1963).

Hart concluded that the "wickedness" of a criminal, while not itself constituting a crime, is certainly relevant to the degree of punishment:

> [T]hose who concede that we should attempt to adjust the severity of punishment to the moral gravity of offences are not thereby committed to the view that that punishment for immorality is justified. For they can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of the *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.

Id., at 37 [emphasis in original].

If the general "wickedness" of a defendant is relevant to the degree of punishment to which he may be subjected, then so also certainly are his thoughts and motivations in committing the crime at issue. In its pursuit of the coldest logic, the Wisconsin Supreme Court has chosen to ignore the most central and respected elements of our sentencing process. Rather than positively reforming that process, the Wisconsin proposal amounts to an unprecedented rejection of centuries of sentencing theory and practice.

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CONCLUSION

In conclusion, and for the reasons set forth above, this Court should reverse the ruling of the Wisconsin Supreme Court and should hold that the Wisconsin sentencing enhancement is consistent with the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted on behalf of the
California District Attorneys
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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

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Supreme Court of the United States

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Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 29

Barclay v. Florida,
463 U.S. 939 (1983) 26

Barnes v. Glen Theatre, Inc.,
___ U.S. ___, 111 S.Ct. 2456 (1991) 27

Boos v. Barry,
485 U.S. 312 (1988) 26

Brown v. Board of Education of Topeka,
347 U.S. 483 (1954) 16

Coker v. Georgia,
433 U.S. 584 (1977) 20

Dawson v. Delaware,
___ U.S. ___, 112 S.Ct. 1093
(1992) 26, 27

Grayned v. City of Rockford,
408 U.S. 104 (1972) 26

Griggs v. Duke Power Company,
401 U.S. 424 (1971) 18

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 14

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 14

Milk Wagon Drivers U. v. Meadowmoor Dairies,
312 U.S. 287 (1941) 25

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 25

Payne v. Tennessee,
___ U.S. ___, 111 S.Ct. 2597 (1991) 19

R.A.V. v. St. Paul,
___ U.S. ___, 112 S. Ct. 2538
(1992) 4, 16, 28, 29

Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) 27, 28

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 14, 23, 24

Screws v. United States,
325 U.S. 91 (1945) 25

Spence v. Washington,
418 U.S. 405 (1974) 25

State of Wisconsin v. Mitchell,
169 Wis. 2d 153 (1992) 2

United States v. O'Brien,
391 U.S. 367 (1968) 24, 26, 29

United States v. Rock Royal Co-op., Inc.,
307 U.S. 533 (1939) 13

Watts v. United States,
394 U.S. 705 (1969) 26, 28

STATUTES

18 U.S.C. § 871 28

42 U.S.C. § 2000a 13

42 U.S.C. § 2000e 18

Hate Crimes Sentencing Enhancement
Act of 1992, H.R. 4797, 102d Cong.,
2d Sess. (1992) 3

Hate Crimes Statistics Act of 1990,
Pub. L. 101-275 3

Wis. Stat. § 939.645(1)(b) 2

OTHER REFERENCES

Anti-Defamation League of B'nai B'rith,
ADL Law Report, ADL in the Courts: Litigation Docket 1991, Fall 1991 3

Black and White: A Newsweek Poll, Newsweek,
March 7, 1988 at 23 15

Boston Police Department, *Community Disorders Unit Incident Breakdown 1978 to 1991* in
Boston Police Dept., 1991 Yearly Report,
Feb. 4, 1992 10

Boston Police Department, Community Disorders
Unit Monthly Reports (1991) 12

Boston Police Department, Community Disorders
Unit, Unpublished Tables 16

Bureau of Justice Statistics Bulletin, No. NCJ-92326,
The Severity of Crime (Jan. 1984) 6

Chicago Commission on Human Relations, Bias
Crime Report (1989) 14

Community United Against Violence, Statistical
Analysis (January-March 1992) 8

G. Comstock, *Violence Against Lesbians and Gay Men* (1991) 6

G. Croug, *Police Say Laguna Beating Was Hate Crime*, L.A. Times, Jan. 11, 1993 5

D. deLeon, Telephone Interview with Dennis
deLeon, New York City Commission on
Human Rights, Nov. 15, 1992 12

L. Duke, *With Gun and Flame, A Hate Crime Begins,* Wash. Post, Jan. 6, 1993 5

B. Flynn, Telephone Interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Units (Nov. 12, 1992) 10

J. Garofalo, *Bias And Non-Bias Crimes In New York City: Preliminary Findings,* Unpublished Paper (1990) 7, 22, 23

D. Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism,* N.Y. Times, June 29, 1990 8

Governor's Task Force on Bias-Related Violence, Final Report (1988) 11, 15, 17

M. Henneberger, *For Bias Victims, A Double Trauma,* N.Y. Newsday, Jan. 9, 1992 20

G. Herek & K. Berrill (ed.), *Hate Crimes Confronting Violence Against Lesbians and Gay Men* (1992) 8, 9, 20

Kelling & Moore, *Evolving Strategy of Policing*, Perspectives on Policing No. 4, Nov. 1988 21

J. Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991 23

S. Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N.Y. Times, Jan. 6, 1993 8

Law Enforcement News, *Decoy Cops Take the Lumps to Sting Houston Gay Bashing*, Sept. 30, 1991 6

V. N. Lee, *Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R. - C.L. L. Rev. (1990) 10

B. Levin, *Bias Crimes: A Theoretical And Practical Overview,* forthcoming 4 Stan. L. & Pol'y Rev. 5, 6, 7, 8, 22

J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry And Bloodshed*, forthcoming Spring 1993 .. 5, 6, 7, 11, 16, 17, 22

Los Angeles County Commission on Human Relations, Intergroup Conflict in Los Angeles Schools (1989) 17

Maryland State Police Criminal Intelligence Division: *Hate/Bias Incident Assessment* (1991) 7

J. McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts (1983-1987)* (November 1989) (Paper presented to the American Society of Criminology on file with the author) 9, 14

National Institute Against Prejudice & Violence, *The Ethnoviolence Project*, Institute Report No. 1 (1986) 9

National Institute Against Prejudice & Violence, *Campus Ethnoviolence: A Research Review* (1992) 18

National Institute Against Prejudice & Violence, *Ethnoviolence on Campus: The UMBC Study* (1987) 18

National Institute Against Prejudice & Violence, *Ethnoviolences At Work* (1992) 18

National Institute Against Prejudice & Violence, *National Victimization Survey*, 1989 19

New Jersey State Police, 1991 Bias Incident Report (1992) 20

New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992) 12

New York City Police Department, Bias Incident Investigating Unit, Tables for Patrol Borough Brooklyn South 1991 16

Nightline: Violent Hate Crime Against Gays (ABC television broadcast, Jan. 26, 1990) 6

Note, *Fighting Words and Fighting Freestyle: the Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178 (1993) 10

Office of the Attorney General, California Department of Justice, Commission on Racial, Religious, Ethnic and Minority Violence: Final Report (1990) 13

Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987 21

L. Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, Jan. 28, 1992 12

Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990 15

Southern Poverty Law Center, *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's,* Special Report (1987) 15

Stroock & Stroock & Lavan, *1992 National Law Enforcement Survey of Bias Crimes* (1993) 3

J. P. Stevens, Associate Justice, United States Supreme Court, Remarks at Yale Law School, October 27, 1992 29

L. Tribe, *American Constitutional Law* (2d ed. 1988) § 12-7 26

U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (1983, 1990) 11

U.S. Department of Justice, *Report to the Nation on Crime and Justice*, 2d Edition, March 1988 ..... 21, 22

Weinstein, *First Amendment Challenges to Hate Crime Legislation*, 11 Crim. Just. Ethics 10 (1992) 22, 25

C. Wexler and G. T. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986) 9, 10

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Amici, enumerated above, with the consent of the parties, submit this brief in support of reversal of the judgment of the Wisconsin Supreme Court in the proceeding below.

INTEREST OF *AMICI CURIAE*

Amici constitute a variety of government agencies and national and state civic organizations which provide legal, educational, victim support and other services regarding bias crimes and related matters. *Amici* have a substantial interest in demonstrating the constitutionality of bias crime statutes because of their central role in eradicating acts of bias violence. Individual descriptions of the agencies and organizations are set forth in the accompanying Appendix at pp. 15-18.

SUMMARY OF ARGUMENT

The Wisconsin Criminal Code provides for enhanced punishment when the State proves that a convicted criminal "[i]ntentionally selects the person against whom the crime . . . is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . . " Wis. Stat. § 939.645(1)(b).

The Wisconsin Supreme Court incorrectly held that the Wisconsin statute violates the First Amendment because it punishes "what the Legislature has deemed to be offensive thought. . . ." *State of Wisconsin v. Mitchell*, 169 Wis. 2d 153, 163 (1992). The statute represents a legitimate exercise of the State's police power to protect the health, safety and welfare of its citizens and does not, in any way, impermissibly infringe upon First Amendment rights. First, even if the First Amendment is somehow implicated by the Wisconsin statute, there are legitimate,

content-neutral justifications for authorizing enhanced penalties for bias offenses which override any concern that free speech might be inhibited. Bias crimes are a criminologically distinct category of offenses that create special and quantifiable harms to society. There is a national consensus that the unique harms justify enhanced penalties for offenders.[1/] It is of grave national concern that bias crimes are rising dramatically.[2/] As shown herein, criminologists have concluded that bias crimes (1) are particularly disruptive to individuals and communities, (2) require a greater application of police resources, and (3) are most often committed to deter whole groups of people from exercising rights relating to housing, employment and public access. Conventional criminal statutes do not address the unique evils that bias crimes pose. Second, and in any event, the proscription of pernicious discriminatory or violent conduct, which the State has a legitimate interest in eradicating, does not in any way implicate the First Amendment.

1/ Forty-six states have enacted statutes that target bias crimes. Anti-Defamation League of B'nai B'rith, *ADL Law Report, ADL in the Courts: Litigation Docket 1991,* Fall 1991. The federal Hate Crimes Statistics Act of 1990, Pub. L. 101-275, mandates data collection regarding bias crimes. *See also* The Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992).

2/ Ten representative jurisdictions have reported an average increase in bias crimes of 24.4% in 1992. Stroock & Stroock & Lavan, *1992 National Law Enforcement Survey of Bias Crimes* (1993). This survey and other prominent studies are presented graphically in the Appendix. Klanwatch also reports an increase in bias homicides for 1992. Letter from Joseph Roy to Brian Levin (Jan. 22, 1992).

ARGUMENT

I. Legislatures Have Legitimate, Reasonable And Content-Neutral Justifications For Enacting Bias Crime Penalty Enhancement Statutes

States have clear interests, wholly unrelated to any expressive content associated with particular conduct, in targeting bias crimes for heightened penalties. As Justice Stevens stated in *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992):

> Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption, *such threats may be punished more severely*. . . .

Id. at 2561 (emphasis added).

A. Excessive Violence

Bias crimes are more violent than non-bias crimes. Indeed, bias crimes are at least three times more likely to involve criminal assault than non-bias crimes. These assaults are twice as likely to cause injury and four times

more likely to result in hospitalization than non-bias assaults.[3/] Unlike crimes based on personal conflict or pecuniary gain, there is little a victim can do to lessen the severity of such an attack. Bias crime victims cannot easily appease an attacker by turning over property or by apologizing for past conduct. The violent purpose behind the crime generally eliminates the opportunity for a victim to lessen his or her injury through any meaningful act of compliance.

Bias crime assaults and homicides are not more severe solely because of the extent of the injuries, but also because of the depravity of the attacks. Victims are often not merely beaten, but severely tortured. For instance, during the first two weeks of 1993, an African-American tourist in Florida was doused with gasoline and set ablaze,[4/] while in California hate crime charges were filed in the case of a man who was beaten so severely that authorities could not even ascertain his race.[5/] Researchers, police and emergency medical professionals

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3/ *See* B. Levin, *Bias Crimes: A Theoretical And Practical Overview*, 4 Stan. L. & Pol'y Rev. 165, 166 (Winter 1992-1993) (hereinafter "*Bias Crimes*"), and J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry and Bloodshed* at 15, forthcoming Spring 1993 (hereinafter "*Hate Crimes*"). (Copies of "*Hate Crimes*" have been lodged with the Court and provided to counsel for the litigants.)

4/ L. Duke, *With Gun and Flame, A Hate Crime Begins*, Wash. Post, Jan. 6, 1993, at A3.

5/ G. Croug, *Police Say Laguna Beating Was Hate Crime*, L.A. Times, Jan. 11, 1993, at A1.

throughout the country recount with disturbing regularity multiple stab wounds and strikes, dismemberments, castrations, skull fractures, mutilations, strangulations and immolations suffered by bias assault victims.[6/] The Houston Police Department abandoned an undercover anti-gay hate crime decoy operation after only ten days because five officers were injured after being attacked with baseball bats, tree limbs and fists in four separate incidents.[7/]

B. Random and Irrational Nature

The irrational nature of bias crimes is particularly disruptive and threatening both to victims and to the community. Compared to conventional crimes, bias crimes are far more likely to be committed randomly against victims by complete strangers.[8/] Criminologists have concluded that there is far greater societal disruption from random acts of violence than there is from those violent acts which have some rational cause.[9/] The disruption to society is of enormous significance when whole groups of citizens are placed in constant fear of

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6/ *Nightline: Violent Hate Crime Against Gays* (ABC television broadcast, Jan. 26, 1990). A study of gay homicide victims over a five-year period reveals similar findings. G. Comstock, *Violence Against Lesbians and Gay Men* 47 (1991).

7/ *Decoy Cops Take the Lumps to Sting Houston Gay Bashing,* Law Enforcement News, Sept. 30, 1991, at 3.

8/ *Bias Crimes* at 167; *Hate Crimes* at 16.

9/ *Hate Crimes* at 17; Bureau of Justice Statistics Bulletin, No. NCJ-92326, The Severity of Crime (Jan. 1984).

random violence from attackers with whom they have no direct connection.

C. Multiple Offenders

Bias crimes are at least twice as likely to involve multiple offenders acting in concert, often against a single victim. Nationally, approximately 25% of violent crimes are committed by two or more offenders.[10/] An analysis of the jurisdictions having the most credible bias crime statistics reveals the disproportionate involvement of multiple offenders.

In Maryland, 71% of the bias crime cases involved multiple offenders.[11/] The comparable figures for New York City and Boston, respectively, were 75% and 64%.[12/] The Boston study reveals that most attacks involved four or more perpetrators and a lone victim.[13/] The conclusions of private researchers are in accord with these law enforcement figures. Numerous studies of large numbers of anti-gay cases, for example, reveal that multiple offender attacks account for between 48 to 78%

10/ *Bias Crimes* at 167; *Hate Crimes* at 21.

11/ Maryland State Police Criminal Intelligence Division: Hate/Bias Incident Assessment 17 (1991).

12/ J. Garofalo, *Bias and Non-Bias Crimes In New York City: Preliminary Findings,* at 16 (manuscript, 1990) (hereinafter "Garofalo"); *Bias Crimes* at 4.

13/ *Hate Crimes* at 22.

of the victimizations.[14/] Such violent group conduct presents unique dangers because: (1) offenders are empowered by the heightened sense of dominance and exhilaration that results from group action; (2) individual offenders lose a sense of direct accountability for actions that occur at the hands of a group; and (3) the group offers anonymity.[15/] An analysis of lynchings in the first part of this century revealed that "the larger the mob, the more atrocious and savage the lynching and the more likely [it is] to include burning or mutilating the victim."[16/] More recently, many of the most publicized bias homicides involved uncontrolled group attacks on lone victims. Such violence by disorderly crowds

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14/ G. Herek & K. Berrill (ed.), *Hate Crimes Confronting Violence Against Lesbians and Gay Men* 21 (1992) (hereinafter "Herek & Berrill"); Community United Against Violence, Statistical Analysis (January-March 1992).

Contrary to publicly available reports that look to the results from multiple jurisdictions, the F.B.I., in a preliminary release of its first hate crime survey, reported that most bias incidents occur one-on-one. As shown *infra*, however, this conclusion is not reflected in the data from those jurisdictions upon whose long-standing reporting systems the F.B.I. program was modeled. It is important to note also that it takes a number of reporting cycles for a hate crime reporting system to achieve the operational efficiency necessary to draw such conclusions; this phenomenon is known as "reporting effect." *See Bias Crimes*, at 171-3, and S. Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N. Y. Times, Jan. 6, 1993, at A8.

15/ D. Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism*, N.Y. Times, June 29, 1990, at C5.

16/ *Id.*

frequently results in more severe injuries, greater community disruption and a disproportionate diversion of scarce police resources.

D. Serial Nature

Numerous well respected studies find that a common characteristic of bias crimes is the presence of related serial victimizations, most of which go unreported. Two studies of Boston bias crimes revealed a pattern of multiple victimizations, starting with minor incidents which often lead to more serious offenses.[17/] In a 1986 study of racial, religious and ethnic victimizations the National Institute Against Prejudice and Violence revealed that 65% of victims experienced "multiple interconnected attacks," with an additional 17.5% experiencing multiple attacks in discrete incidents.[18/] Another influential study of anti-gay attacks revealed that 68% of those who had been threatened with violence and nearly half (47%) of those who had been physically assaulted reported multiple experiences of such episodes.[19/]

17/ Jack McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts* (1983-1987), at 3 (July 1989) (Paper presented at the American Society of Criminology) (hereinafter "*The McDevitt Study*" a copy of which has been lodged with the Court); C. Wexler and G. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205, 208 (1986) (hereinafter "*Law and Order*").

18/ National Institute Against Prejudice & Violence, *The Ethnoviolence Project*, 5 (1986) (hereinafter "*Ethnoviolence Project*").

19/ Herek & Berrill at 21; *Bias Crimes* at 168.

Clearly, conventional criminal statutes do not adequately deter bias crimes.[20/] Before the passage of Massachusetts' bias crime statute, the Boston Police Department consistently responded to repeat bias crimes committed either against the same victims, by the same perpetrators, or both. The first case prosecuted in the state under this statute involved a group of individuals whose members had been repeatedly arrested for committing criminal acts against the same group of minority families.[21/] After Boston began widespread enforcement of the statute, repeat incidents dropped significantly and the overall level of reported bias crimes in Boston fell by two-thirds.[22/] As the U.S. Commission on Civil Rights observed in a 1983 report:

> Effective police responses . . . are necessary to keep such [bias] incidents from spreading. If the police fail to respond or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret

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20/ *See generally Law and Order*; V. N. Lee, *Legislative Response to Hate-Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R.-C.L. L. Rev. (1990); Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178 (1993).

21/ Telephone interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Unit (Nov. 12, 1992).

22/ *See Law and Order* at 212; *Community Disorders Unit Incident Breakdown 1978 to 1991* in Boston Police Dept., 1991 Yearly Report, Feb. 4, 1992.

> the police inactivity as official sympathy or even sanction.[23/]

E. Risk of Social Disorder

The interchangeability of victims based merely upon perceived status heightens the social disruption associated with bias crimes. The substitutable nature of the victimization places entire classes of people on notice that they face a threat over which they have little meaningful control.[24/] The potential for conflict that flows from this characteristic of bias crimes creates particularly explosive situations, where one incident can lead to a series of related acts of random inter-group retaliation. A New York State task force recently concluded that "[a] single incident can be the tragedy of a lifetime to its victim and may be the spark that rends and disrupts an entire community."[25/]

Bias-related tensions, particularly those involving race, have consistently sparked this nation's most violent and disruptive civil disorders. Ample evidence illustrates how one incident can spark a series of incidents of

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23/ U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* 17 (1983, 1990).

24/ *Hate Crimes* at 20.

25/ Governor's Task Force on Bias-Related Violence, Final Report at E.S. 10 (1988) (hereinafter "*New York Report*").

random retaliation.[26] The law enforcement data show that generally significant increases in the reported number of bias crimes within one city can be attributed to a large number of localized incidents or by an increase in the number of incidents occurring between members of two specific status groups involved in a trigger incident.[27] These data indicate that a single incident can aggravate intergroup tensions and lead to a cycle of violent and criminal behavior.

26/ According to police, perpetrators commonly refer to the initial incidents as their motivation for committing subsequent offenses. A notable example occurred in the Bronx in January 1992, after two minority youths were beaten, robbed, smeared with white sneaker polish and told it was "their day to be white." L. Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, Jan. 28, 1992, at B1. The borough experienced more bias crimes in January than in the previous four months combined. New York City as a whole experienced two and one-half times the number of bias crimes in January than it had in December. New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992). The mayor, additional police and social service personnel were summoned to the area to diffuse tension in the community. Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, Nov. 15, 1992.

27/ For example, in August 1991, 34 bias crimes were reported in Boston, compared to 16 cases in July and 10 cases in September of 1991. Of the 34 reported incidents, 10 occurred within a single police district; 8 of these 10 occurred in a housing project where the trigger incident took place. All these incidents involved solely whites and Hispanics. Boston Police Department, Community Disorders Unit Monthly Reports (1991). Were these increases in the number of reported incidents due merely to an increased efficiency in the reporting of all bias incidents of all types, we would not expect to see increases limited to these specific status or geographic categories.

F. Limits Exercise of Civil Rights

The government has a clear interest in promoting the rights of its citizens to open, non-discriminatory travel, housing, educational and employment opportunities. However, bias crimes are distinctive because they directly and forcefully interfere with the exercise of such civil rights. A California state commission observed, "When acts of hate violence are prosecuted under other [general] laws, those laws typically address only specific criminal acts involved, such as vandalism or assault without regard to the civil rights they violate."[28]

i) Travel

Just as the federal government has a legitimate interest in regulating discriminatory conduct in interstate travel under the Commerce Clause, the states themselves have legitimate interests in regulating such conduct with respect to intrastate travel. The Court stated in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 569, 570 (1939), "[t]he authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the States over intrastate commerce." Thus, the Court approved objective of Title II of the Civil Rights Act of 1964: ". . . to vindicate the deprivation of personal dignity that surely accompanies

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28/ Office of the Attorney General, California Department of Justice, Commission on Racial, Religious, Ethnic and Minority Violence: Final Report 46 (1990).

denials of equal access to public establishments"[29] -- is an objective that the states may legitimately advance.

Bias crime victims are often simply travelling when attacked. A recent study of the Boston Police Department's bias crime data shows that the majority of bias offenders committed their crimes merely because an individual was driving, working, passing through or moving into a neighborhood. The study found, "[t]he lack of public access to certain neighborhoods in our cities is a truly serious problem."[30] A 1989 Chicago report was in accord with the Boston study, revealing that 56% of bias crimes in the city over a two year period involved travel or relocation into a hostile neighborhood or the use of a public facility by the victim.[31]

ii) Housing

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that it was permissible for Congress to bar all racial discrimination, both private and public, in the sale or rental of property. As shown below, bias crimes directly interfere with the housing rights that Congress has sought to protect. The New York State Governor's Task Force on Bias-Related Violence has reported that:

29/ *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984), citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

30/ *The McDevitt Study* at 9.

31/ Chicago Commission on Human Relations, Bias Crime Report 4 (1989).

> Attempts to deprive minorities of equal access to housing through harassment, intimidation, threats, vandalism, arson and other acts of violence persist and have intensified. This is true 20 years after the enactment of the Federal Fair Housing Act and the extension of the New York State Human Rights Law to non-public housing more than 25 years ago.[32]

Fewer than one-half of the white respondents in a 1988 Newsweek poll said they preferred to live in a racially mixed neighborhood.[33] The presence of minorities in ethnically changing neighborhoods frequently results in criminal victimization. A 1987 study concluded that "[m]inority families are at risk in many communities from hard-core racists who see their all-white neighborhoods as the last bastions of segregation."[34] Demographic changes which affect the composition of neighborhoods is yielding a repeating pattern which results

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32/ *New York Report* at 242.

33/ *Black and White: A Newsweek Poll*, Newsweek, March 7, 1988, at 23.

34/ Southern Poverty Law Center, Special Report, *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's* (1987); Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990, at A1.

in outbreaks of bias violence when minority integration reaches a certain level, usually between 20-25%.[35/]

Justice Blackmun concluded in *R.A.V.*, "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes . . ." 112 S.Ct. at 2561.

iii) Schooling

In *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court recognized that the opportunity of a state education must be available to all on equal terms. The Court stated:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. *Id.* at 494.

35/ Boston police were able to discern a repeating pattern of a significant increase in bias crimes when housing projects were integrated to a certain level. Boston Police Department Community Disorders Unit, Unpublished Tables (lodged with the Court). Similarly, in 1991 minority integration in Canarsie, Brooklyn had reached 25% when the firebombing of an "integrationist" real estate office touched off a series of attacks resulting in more bias crimes in a three week period in the area than in the previous six months. *Hate Crimes* at 95-98; New York City Police Department, Bias Incident Investigating Unit, Tables for Patrol Borough Brooklyn South 1991.

Tragically, however, schools and colleges are becoming increasingly identified by new research as one of the most common areas where bias crimes occur, thus threatening, *de facto*, the protections afforded by *Brown* (and also stigmatizing those groups not embraced by the *Brown* decision). A nationwide 1990 Harris poll of high school students found over half the respondents said they witnessed racial incidents at least once in a while, and some "very often." Almost half said they either approve of such attacks or would participate in one. In a further disturbing survey by the State of New York of almost three thousand junior and senior high school students, 43% have witnessed acts of bias violence at school, 16% have been victims and 8% have been injured.[36/] A 1989 Los Angeles County school survey of 956 responding institutions revealed that in addition to many non-criminal bias incidents, 1,237 acts of reported physical violence, graffiti and property damage took place in a single school year.[37/] A 1987 study by the National Institute Against Prejudice and Violence of the University of Maryland-Baltimore County revealed that in a single school year, over 5% of the students were harassed, threatened, physically attacked, or experienced property destruction motivated by racial, religious or ethnic animus. According to the National Institute, 20% of minority college students

36/ *Hate Crimes* at 136; *New York Report* at ES 8-9.

37/ Los Angeles County Commission on Human Relations, Intergroup Conflict in Los Angeles Schools, 10-11 (1989).

are either assaulted or harassed and these acts are increasing significantly.[38/]

iv) Employment

In *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971), the Court opined that in enacting Title VII of the Civil Rights Act of 1964, Congress required "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The National Institute has found that the workplace is one of the most common locations for bigoted abuse and crimes; 27% of all such incidents, according to the Institute, occurred at work. Disturbingly, the study also found that 39% of all acts of criminality or abuse at the workplace are motivated by prejudice. The Institute found that demographic changes, economic shifts, increased competition, and resentment are responsible for existing underlying tensions and that these conditions will continue.[39/] The report concluded:

> Ethnoviolence in the workplace is prevalent and costly for employers and employees, and for victims as well as non-victims who

38/ National Institute Against Prejudice & Violence, *Ethnoviolence on Campus: The UMBC Study*, 16 (1987); *Campus Ethnoviolence: A Research Review* (1992).

39/ National Institute Against Prejudice & Violence, *Ethnoviolences At Work*, 26 (1992).

> are their colleagues. Not only does ethnoviolence have a demoralizing impact on the work force . . . but it also deprives large numbers of people of the right to earn a living in a non-threatening atmosphere.[40/]

G. Effect on Victims

The effects of a specific crime on a specific victim are highly relevant considerations for the judge in determining an appropriate punishment. *See Payne v. Tennessee*, __ U.S. __, 111 S.Ct. 2597 (1991). *Mutatis mutandis*, the probable effects of a type of crime are highly relevant considerations for the legislature in determining the appropriate range of sentencing available to the judge. Such consideration in the area of bias crimes reveals that their heightened deleterious effects render appropriate heightened punishment. In a study by the National Institute Against Prejudice And Violence, researchers concluded that victims of bias-type attacks suffered 21% more adverse psychological and physiological symptoms than victims of the same crimes that were not bias-related.[41/] Another study by the National Institute's Ethnoviolence Project concluded that "[m]any victims fear for their safety and for their family's safety . . . many of them report changes in their lifestyle -- where they walk, how they answer the phone and the

40/ *Id.* at 32.

41/ National Institute Against Prejudice & Violence, *National Victimization Survey*, 1989.

. . . fear can disrupt totally the lives of some victims."[42/] A National Gay & Lesbian Task Force study revealed that 83% of gay and lesbian respondents expected future victimization and 62% feared for their safety.[43/] Part of the distinct trauma bias crime victims experience results from their unique vulnerability together with the degradation that is experienced when attacked for a characteristic that is central to one's identity. Distressingly, many victims are youths who are at a stage in life where the emotional impact from such attacks is particularly severe and long-lasting.[44/]

H. Adverse Effect on Community

The Court noted in *Coker v. Georgia*, 433 U.S. 584, 598 (1977), that because rape "undermines the community's sense of security, there is public injury." Bias attacks also create such "public injury" because they undermine any sense of security the community may have in freedom from such crimes. Criminologists have found that disorderly or threatening conduct within a community, rather than direct violent victimization, is far more

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42/ *Ethnoviolence Project* at 6-9.

43/ Herek & Berrill at 20.

44/ M. Henneberger, *For Bias Victims, A Double Trauma*, N.Y. Newsday, Jan. 9, 1992, at 113. *See also* New Jersey State Police, 1991 Bias Incident Report, 7 (1992) showing that more victims belong to the 11 to 17 age group than any other. Other jurisdictions show that children constitute a substantial percentage of those who are victims of bias crimes.

responsible for the fear and anxiety felt by most citizens.[45/] This public, communal suffering is as relevant as any individual suffering that might occur as a result of these crimes and, of itself, is sufficient justification for penalty enhancement. "[P]eople who have not been personally victimized may be strongly affected when they hear how others have been victimized."[46/] Bias crimes affect the community in a peculiarly pernicious way. Bias crimes diminish community cohesion by breeding fear and suspicion of criminality in a way which establishes the potential for further conflict between status groups. Such potential is typically absent with respect to crimes of a more general nature.

I. Cumulative Terroristic Effect

According to the FBI, terrorism is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."[47/] The fact that bias crimes are more likely to involve excessive violence, random and serial attacks, multiple unknown offenders and a high risk of social disorder makes such offenses especially threatening to victims and to their immediate community. As one

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45/ Kelling & Moore, *Evolving Strategy of Policing*, Perspectives on Policing No. 4, November 1988, at 8.

46/ U.S. Department of Justice, *Report to the Nation on Crime and Justice*, 2d ed., March 1988, at 24 (hereinafter "*Report to the Nation*").

47/ Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987, at 14-15.

commentator has noted, "The effect of Kristallnacht on German Jews was greater than the sum of the damage to buildings and assaults on individual victims."[48/] Accordingly, criminologists regard these offenses as being terroristic.[49/]

J. Requirement of Additional Resources

Bias crimes require a disproportionate allocation of government resources.[50/] This is because it is both more difficult to apprehend perpetrators and harder to control the resulting social unrest which can follow such incidents. Because of the frequent lack of a direct personal connection between the parties and the lack of tangible evidence, such as stolen property, it is more difficult for police to effect arrests in bias crime cases. Arrest rates for bias crimes are generally less than 25%,[51/] even though at least half of them involve direct physical confrontation.[52/] In contrast, the overall arrest rate for violent crimes is about 48%.[53/] These differing arrest rates cannot be attributed simply to a lack of police effort in investigating bias crimes. In New York City, 85% of

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48/ Weinstein, *First Amendment Challenges to Hate Crime Legislation*, 11 Crim. Just. Ethics 10 (1992) (hereinafter "Weinstein").

49/ *Hate Crimes* at 214.

50/ Garofalo at 17-18.

51/ *Bias Crimes* at 167.

52/ *Id.* at 3.

53/ *Report to the Nation* at 69.

bias crimes received follow-up investigative time of more than a month, while only 2% of non-bias crimes did. New York City police filed 3 or more investigative reports in 93% of the bias cases, but only 7% of the non-bias cases resulted in 3 or more report filings.[54/]

Moreover, when intergroup tensions are ignited, they often require a substantial law enforcement presence to control. After a fatal mixed-race auto accident in Brooklyn in August 1991, 1,500 police officers were needed to contain the resulting riots, which lasted for four days and resulted in 180 arrests.[55/]

II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment

The Wisconsin statute does not criminalize beliefs. Rather, it regulates a form of discriminatory conduct -- the intentional selection of a victim based on his or her status. As such, the Wisconsin law falls squarely within the category of regulation, expressly approved by this Court, that addresses the "unique evils" caused by invidious discrimination. As the Court held in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

> [A]cts of invidious discrimination . . . cause unique evils that government has a

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54/ Garofalo, Comparison Table.

55/ J. Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991, at A27.

> compelling interest to prevent -- wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to *no constitutional protection*.

Id. at 628 (emphasis added).[56/]

Criminal activity motivated by prejudice can be no more protected under the First Amendment than is discrimination in the areas of housing, employment, education, freedom of association and public access. The Wisconsin statute simply and narrowly targets such criminal activity. It is entirely appropriate for a state, in the administration of criminal justice, to punish and deter discriminatory violence by enacting a statute that gives

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56/ The *Roberts* Court assumed that the relevant state statute, which forbade discrimination in access to public facilities on the basis of race, color, creed, religion, disability, national origin or sex, met the test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), *viz.*, that the regulation furthers an important governmental interest, that the interest is unrelated to the suppression of free expression and that the incidental restriction on First Amendment freedoms is no greater than necessary to further the government interest. *Id.* at 377. But even were the Wisconsin statute to focus on the expressive content of a crime rather than on the method by which the criminal selects a victim, it would still pass constitutional muster. As demonstrated above, the "secondary effects" of bias crimes provide an independent basis for enforcing the constitutionality of such penalty enhancement provisions. *See* § I, *supra*.

clear notice to the public of the relevant conditions and penalties. *See Screws v. United States*, 325 U.S. 91, 105, 109 (1945). Discriminatory selection of a victim or even bias animus can be "taken into account by a legislature in enhancing punishment for hate crimes when relevant to any of the considerations that the state may legitimately look to in formulating the degree of punishment for a crime."[57/]

III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment

"The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Because violent acts and threats run counter to the purposes of the First Amendment guarantee of freedom of speech, this Court has consistently allowed the government to regulate such conduct. "[In] back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind." *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941). The fact that a threat or act of violence has an expressive component does not diminish the government's authority to punish an offender. Violence and threats simply are not afforded constitutional protection. As the Court noted in *Spence v. Washington*, 418 U.S. 405, 409 (1974):

> [I]t is . . . necessary to determine whether [the] activity was sufficiently imbued with

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57/ Weinstein at 8.

> elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[58/]

It has already been determined that crimes of violence involving status-based discrimination may be punished more severely than otherwise without offending First Amendment principles. In *Barclay v. Florida,* 463 U.S. 939, 949 (1983), this Court ruled that the defendant's racial hatred and desire to start a race war was relevant to the propriety of a capital sentence. Recently, in *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992), the Court declared: "We therefore conclude that the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations simply because those beliefs and associations

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58/ *See also Watts v. United States,* 394 U.S. 705 (1969) (the government may constitutionally punish bona fide threats against the President provided that it does not make viewpoint based differentiations); *Boos v. Barry,* 485 U.S. 312, 331 (1988) ("where demonstrations turn violent, they lose their protected quality as expression under the First Amendment," quoting *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972)). As Professor Tribe noted in American Constitutional Law (2d ed. 1988) § 12-7 at 828, n. 18, "[T]he Court . . . has been reluctant to concede that the First Amendment has any relevance whatsoever to political assassination, radical bank robberies, or other violent modes of expression."

are protected by the First Amendment." The Court openly suggested that "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs." *Id.* at 1098. The Wisconsin statute does avoid the problem by requiring proof beyond a reasonable doubt of intentional selection.

IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence

Aside from their interest in eradicating discriminatory or violent conduct against their citizens, states often have other substantial reasons, unrelated to expression or belief, to regulate conduct which has an expressive element.

In *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 47-48 (1986), this Court ruled that a zoning ordinance that restricted the location of adult movie theaters was constitutional because it "aimed not at the [expressive] content . . . but rather at the secondary effects. . . ." The Court pointed to the ordinance's purpose "to prevent crime . . . and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life. . . ." Similarly, in *Barnes v. Glen Theatre, Inc.,* ___ U.S. ___, 111 S.Ct. 2456 (1991), the Court held that a total ban on nude dancing was constitutional, notwithstanding any free expression interests, because states have legitimate interests in protecting public order and morality. Justice Scalia, in a concurring opinion, concluded that general laws regulating

conduct and not specifically directed at expression do not violate the First Amendment. *Id.* at 2465.

In *R.A.V.*, while holding unconstitutional a local ordinance which prohibited the display of certain symbols, the Court nonetheless reasoned that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Indeed, the *R.A.V.* Court expressly approved longstanding precedent allowing the government to make content based prohibitions in three specific instances.

First, the Court recited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 2545. The Court differentiated between permissible content discrimination and impermissible viewpoint discrimination by examining laws which prohibit threats of violence against the President. 18 U.S.C. § 871.[59/] Second, citing *Renton,* the Court reaffirmed that differential treatment of content based groups is permissible if the disparate treatment is based on the "secondary effects" of the speech and not the expressive

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59/ The Federal government may constitutionally punish threats against the President because of the potential for significant societal disruption. *Watts v. United States,* 394 U.S. 705, 707 (1969). The government, however, is not allowed to punish threats solely because those threats implicate a particular point of view. *R.A.V.*, 112 S.Ct. at 2546.

content. *Id.* at 2546. Third, the Court recognized that the states have broad authority to discriminate based on content when "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.[60/]

CONCLUSION

Justice Stevens recently stated, "[n]either a trespass on private property nor an assault against an individual need be characterized as speech in the Constitutional sense."[61/] It has never been supposed that, when a criminal is motivated by an invidious idea or philosophy in carrying out his or her criminal purpose, the motivating idea or philosophy is somehow beyond examination for the purpose of determining an appropriate punishment. *A fortiori,* there can be no such limitation where the effects of the conduct in question are as devastating and as widespread as the effects of bias crimes. For all of the

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60/ This Court consistently has refused to employ the First Amendment to shield unlawful conduct from regulation. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a law which gives the state authority to close an adult book store when prostitution takes place at the location); *United States v. O'Brien,* 391 U.S. 367 (1968) (prohibition of draft-card destruction is constitutional, notwithstanding any expressive component).

61/ *The Freedom of Speech*, remarks of John Paul Stevens, Associate Justice, United States Supreme Court at Yale Law School, Oct. 27, 1992.

foregoing reasons, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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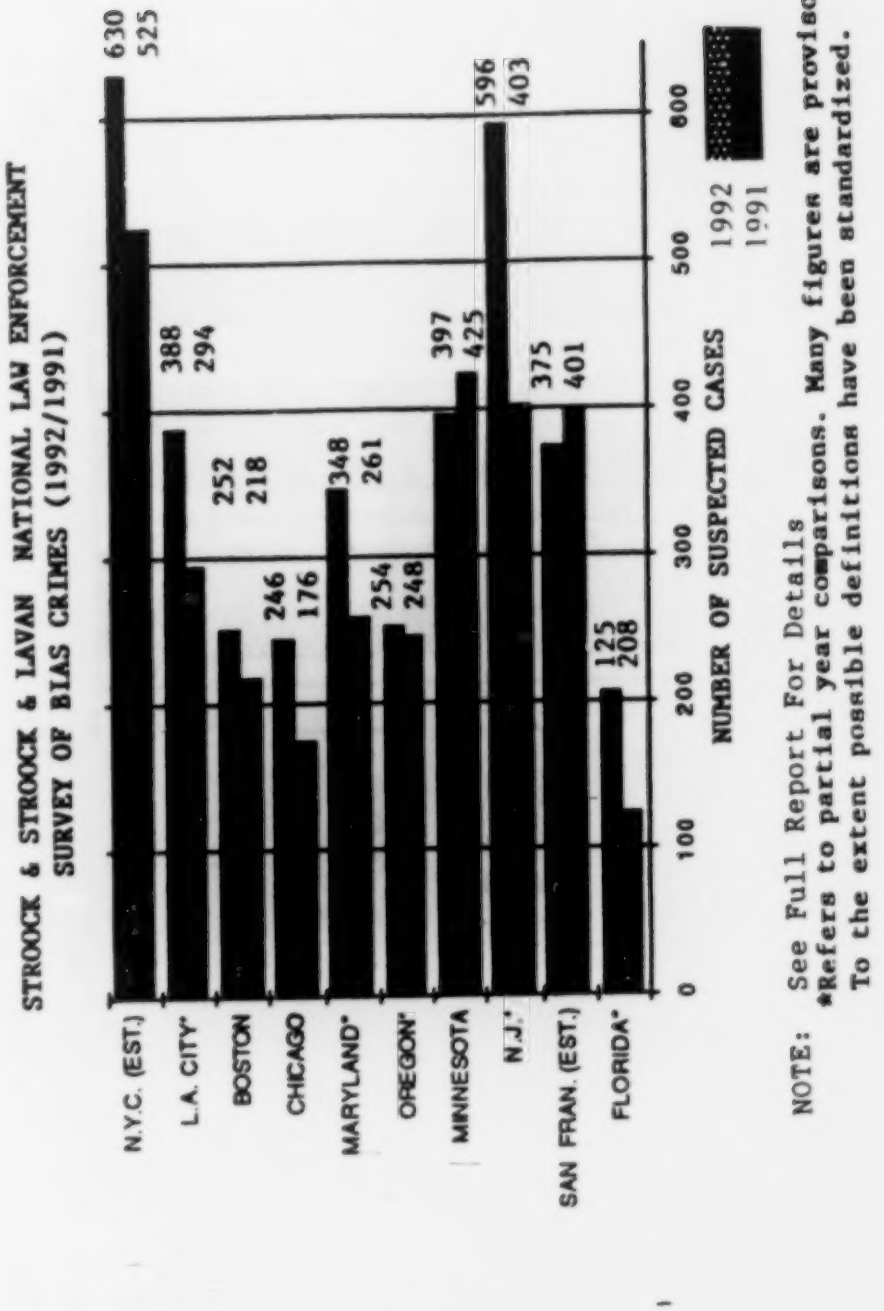
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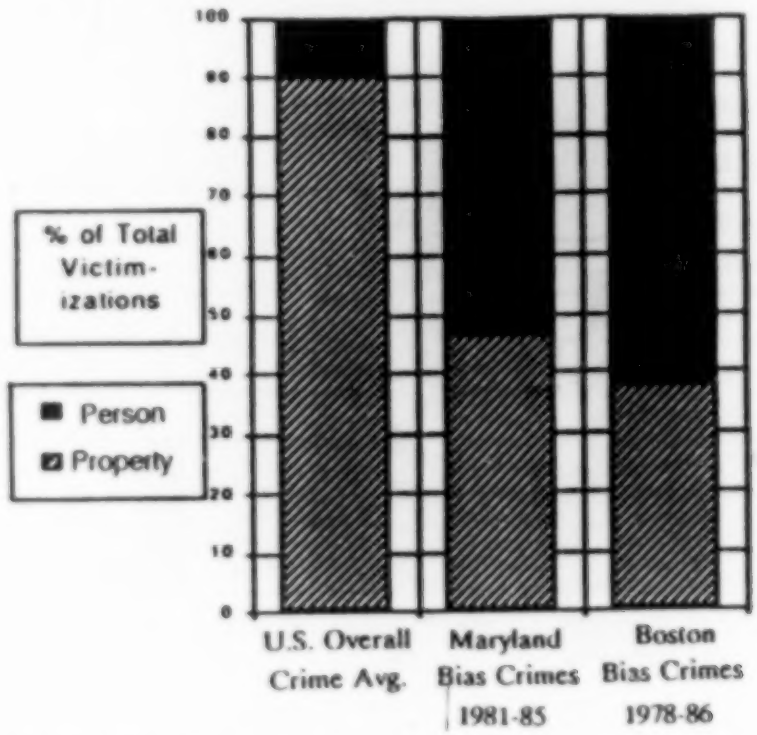
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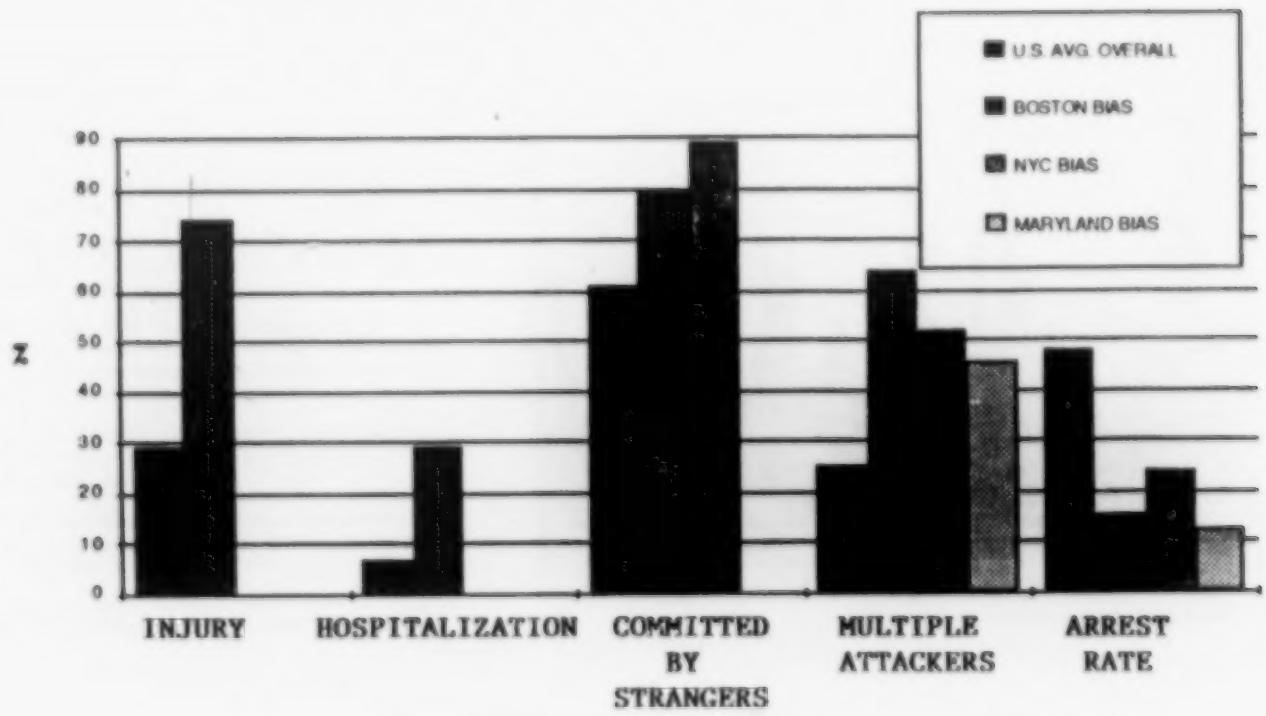
NOTE: See Full Report For Details
*Refers to partial year comparisons. Many figures are provisional.
To the extent possible definitions have been standardized.

THE RELATIVE FREQUENCY OF PERSON/PROPERTY
ATTACKS OF VARIOUS BIAS AND NON-BIAS CRIMES



Source: FBI Crime In The United States 1985, Maryland State Police Criminal Intelligence Division, Boston Police Department Community Disorders Unit, Incident Breakdown

COMPARISON OF BIAS AND NON-BIAS CRIMES



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THE IMPACT

A Pattern of Attacks

Reports of bias attacks tend to peak shortly after a widely publicized incident.

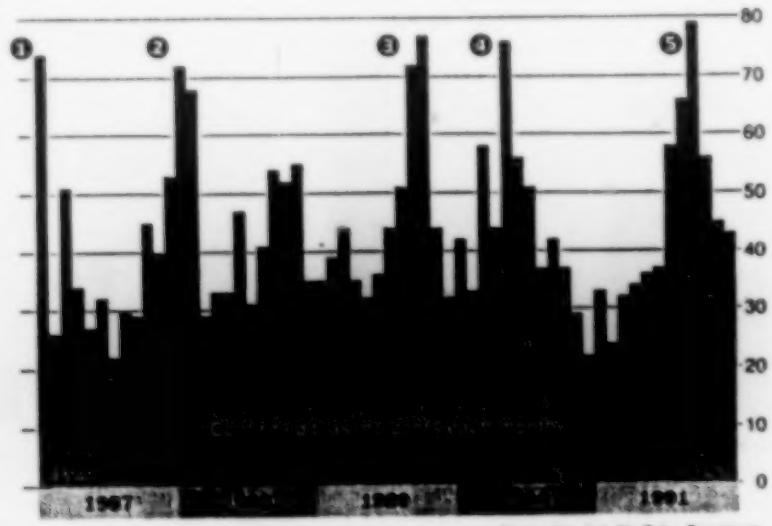
1. Dec. 20, 1986 Michael Griffith, a black man, is killed in Howard Beach, Queens, as he is chased onto a highway by a group of white men.

2. Nov. 28, 1987 Tawana Brawley is found in Wappingers Falls, N.Y., with racial slurs written on her torso. Law-enforcement officials later say her report of assault by six white men is a hoax.

3. Aug. 23, 1989 Yusuf Hawkins, a black teen-ager, is confronted by a gang of white teen-agers and shot in Bensonhurst, Brooklyn.

4. April and May 1990 A dispute between a Korean grocer and a black customer in the Flatbush section of Brooklyn provokes demonstrations.

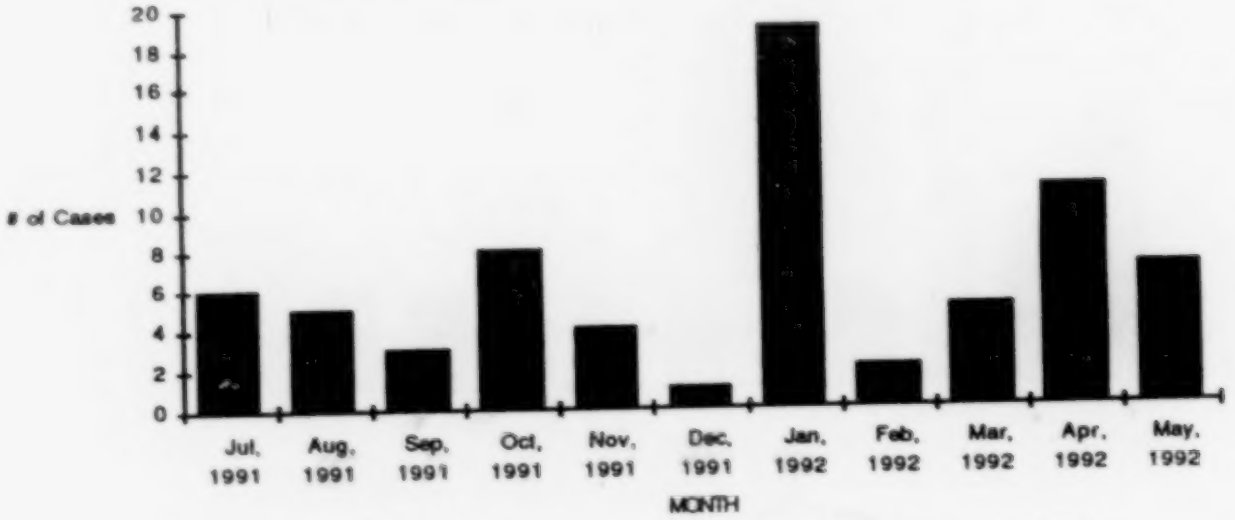
5. Aug 19, 1991 A Jewish driver loses control of his car in Crown Heights, Brooklyn, killing a black child.



Source: New York City Police Department

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THE CONFLICT GENERATING POTENTIAL OF BIAS CRIMES
The Bronx, New York 1991-1992



NOTE: "Trigger" Incident Took Place In January 1992

Source: New York City Police Department

BACKLASH - NEW YORK CITY BIAS CRIMES IN
WAKE OF HOWARD BEACH HOMICIDE

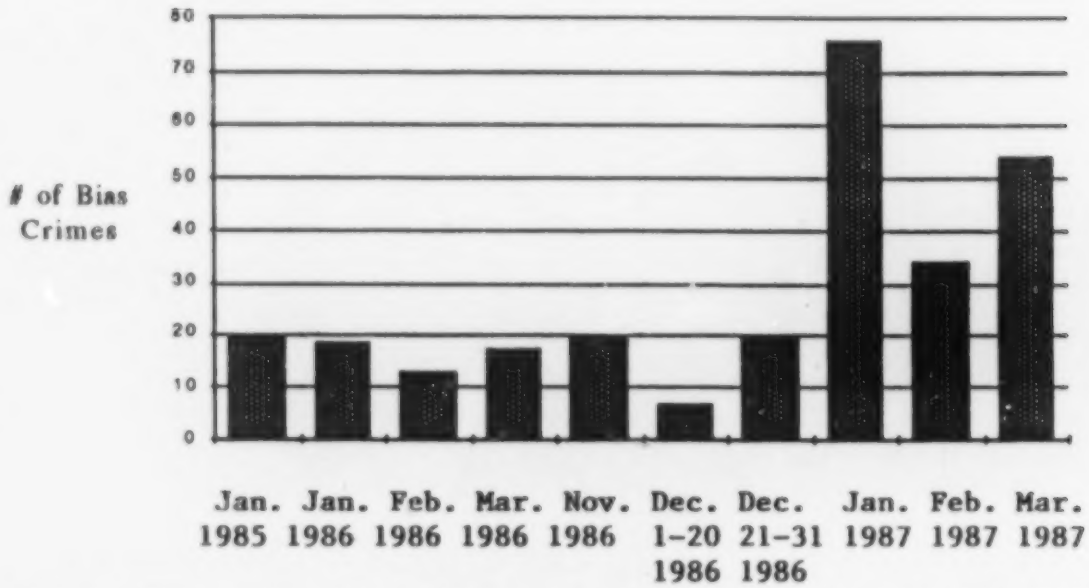
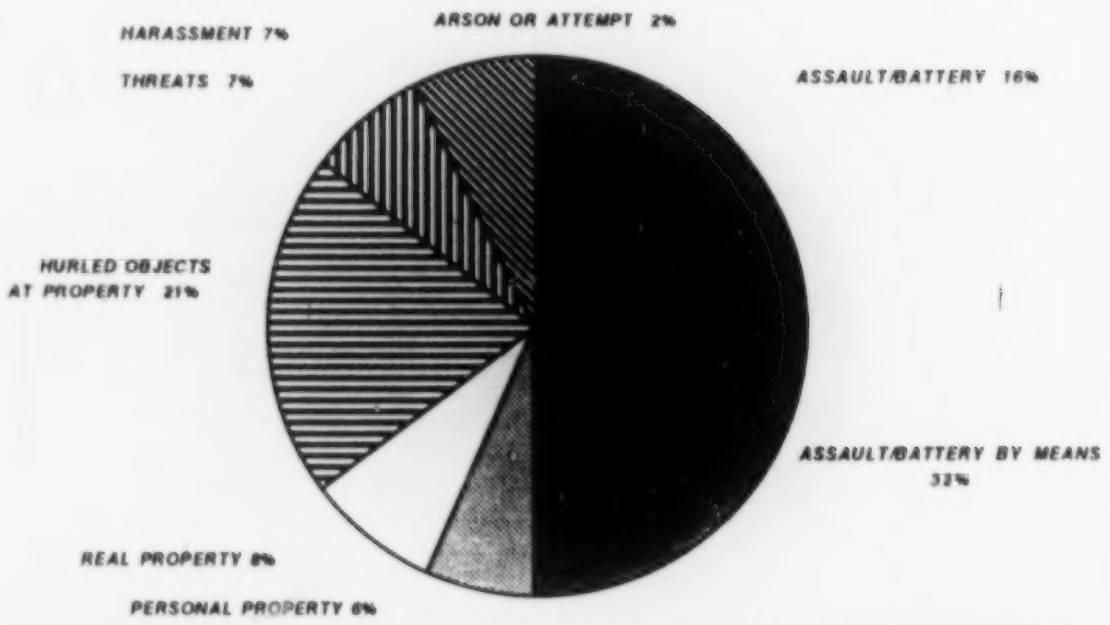


Chart from Levin, A Practical Approach to Bias Crimes II (1993)

Howard Beach attack occurred Dec 20, 1986.
This graph shows the explosive nature of these incidents.

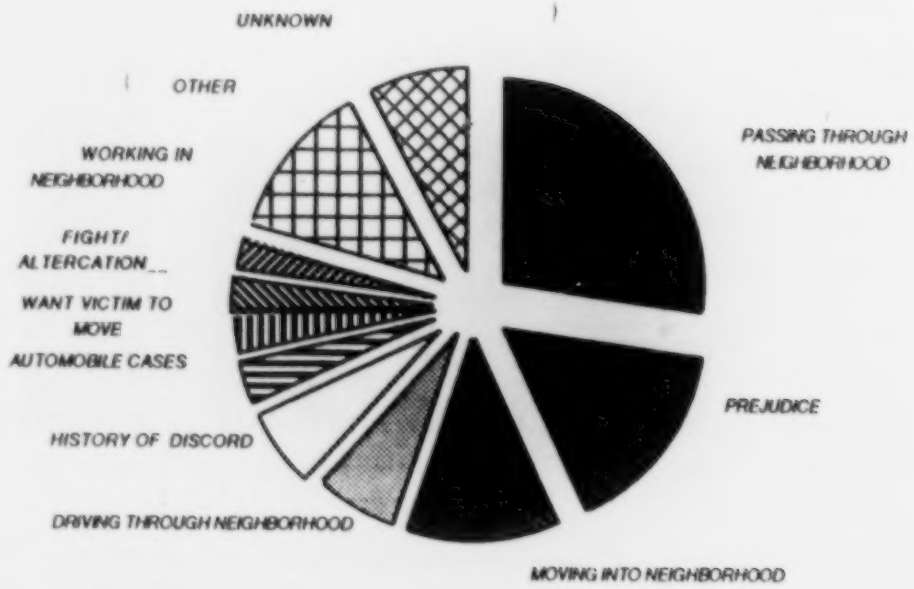
Source of Data: New York City Police Dept.

BOSTON BIAS CRIMES BY TYPE 1978 - 1991



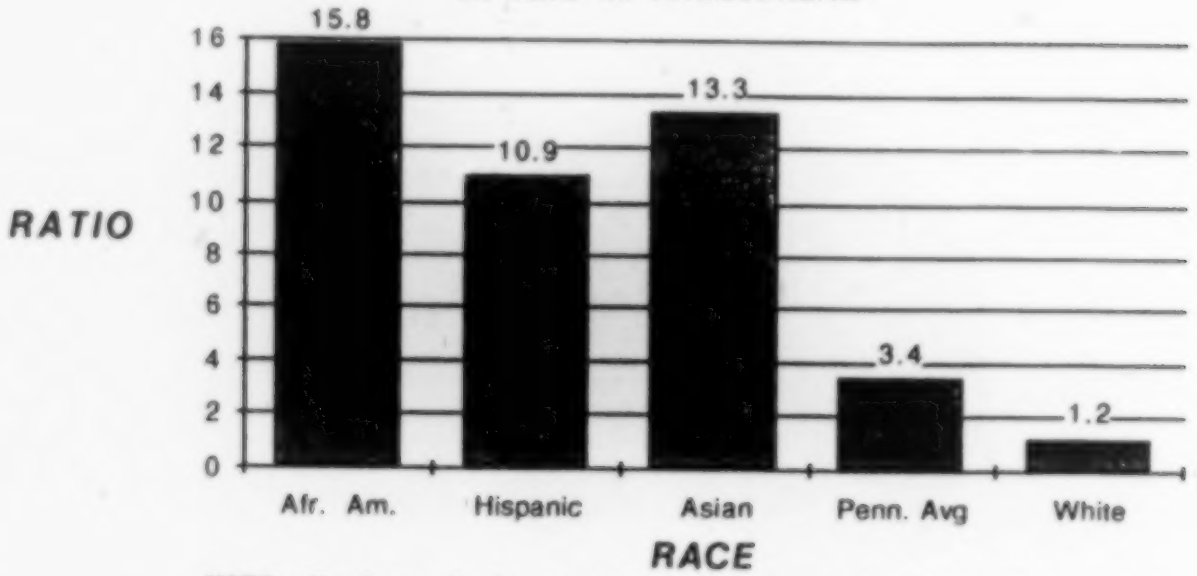
Source: Boston Police Department Community Disorders Unit.
Chart reprinted courtesy of Stanford Law & Policy Rev.

BIAS CRIMES CLASSIFIED BY REASON GIVEN



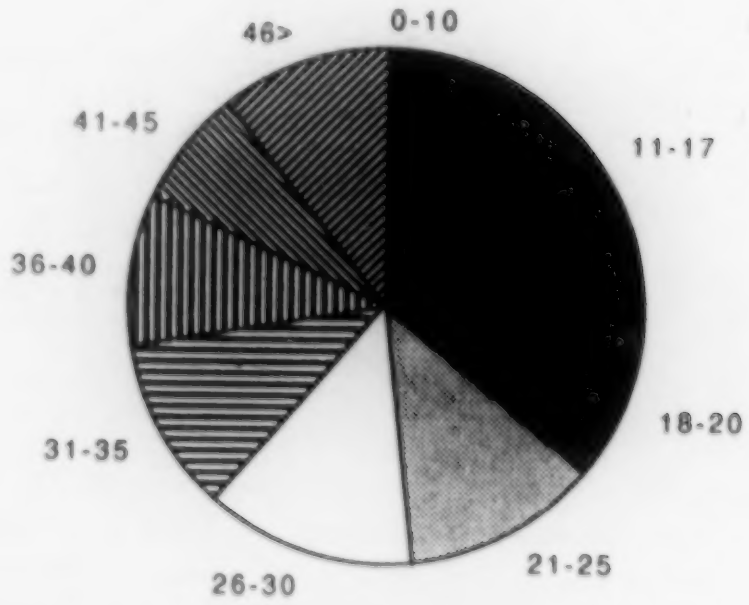
SOURCE: The McDevitt Study at Table V

DISPROPORTIONATE IMPACT OF BIAS CRIMES
BY RACE IN PENNSYLVANIA



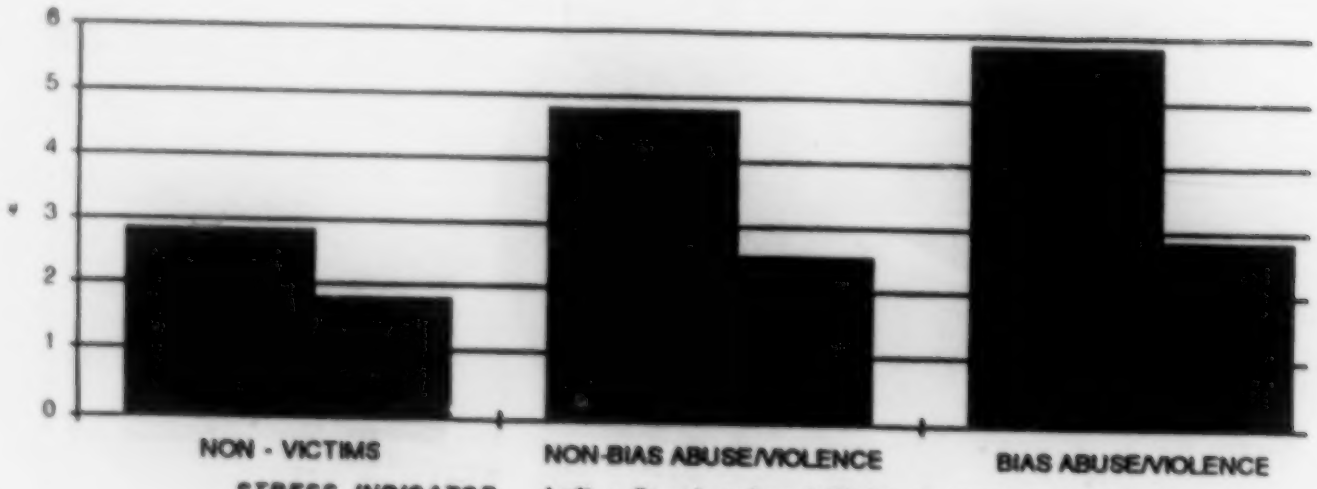
NOTE: Numbers Reflect victimizations Per 100,000 people.
SOURCE: Pennsylvania Attorney General, Hate Crimes Report 1990-1992 (1992)

BIAS CRIME VICTIMS BY AGE
NEW JERSEY (1991)



SOURCE: New Jersey State Police, 1991
Bias Incident Report 7 (1992)

NEGATIVE PSYCHO-PHYSIOLOGICAL SYMPTOMS/
DEFENSIVE BEHAVIORAL CHANGES
BY VICTIMIZATION



NOTE: The study measured the number of physiological and psychological stress factors along with the number of behavioral changes that individuals experience in different circumstances.

Source: National Institute Against Prejudice & Violence.

PERCENTAGE OF UNITED STATES POPULATION
EXPERIENCING BIAS ABUSE IN ONE YEAR

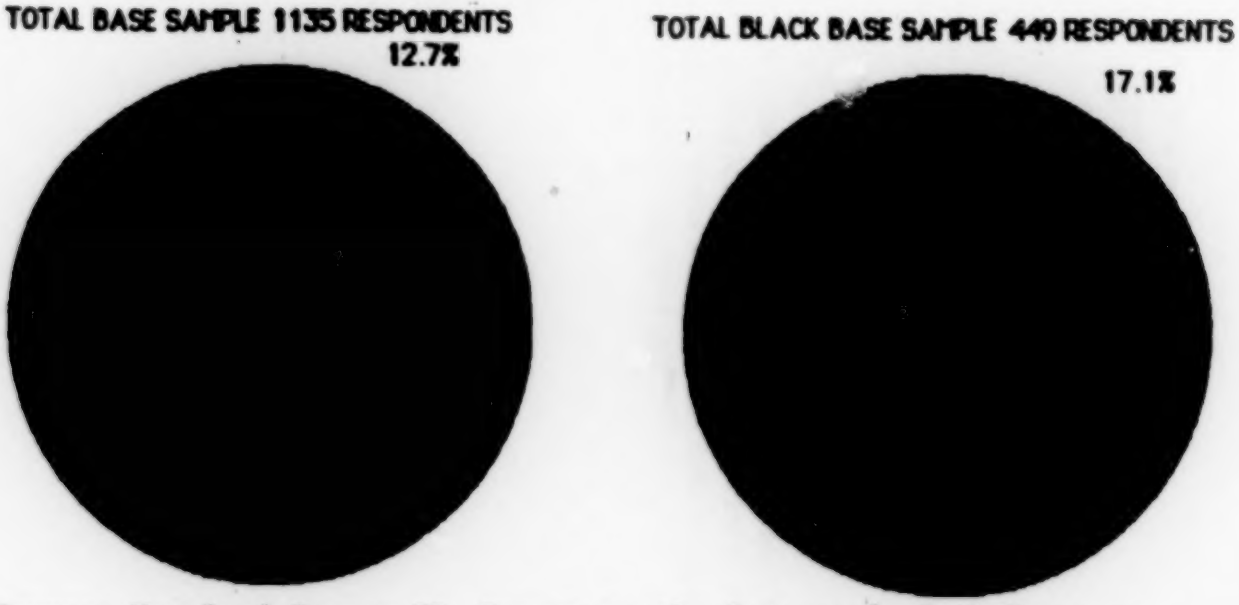


NOTE: Includes Criminal and Non-Criminal Incidents

SOURCE: National Victimization Survey, 1989

BIAS VICTIMIZATION SURVEY
(MARYLAND 1986)

Have you yourself ever been the target of property destruction or have been harassed, threatened or physically hurt for what you would consider racial, ethnic or religious reasons?



Source: Maryland Survey II, Report to the Governer's Task Force on Violence & Extremism. Chart from Levin, "Blacks & Racial Bias"(1987).

A-14

KLANWATCH

A PROJECT OF THE SOUTHERN POVERTY LAW CENTER

400 WASHINGTON AVENUE • MONTGOMERY, AL 36104
205/264.0286 • FAX 205/264.0629

January 22, 1993

Dear Mr. Levin,

The Klanwatch Project's annual report, to be published in February, 1993, will contain research showing bias homicides have increased for the fourth consecutive year. The report will also show an increase in the number of Ku Klux Klan groups for the second consecutive year.

Sincerely,

Joseph T. Roy
Chief Investigator
Klanwatch Project

DESCRIPTION OF THE *AMICI CURIAE*

The California Association of Human Rights Organizations ("CAHRO") is a state-wide network of human rights and human relations associations. Its purpose is to promote full acceptance of all persons in all aspects of community life without regard to any arbitrary definition of differences; to engage in activities designed to protect basic human and civil rights; to participate in the development of public policy related to human and civil rights; and to serve as a resource in the resolution of inter-ethnic and inter-group conflicts. The municipalities and areas in which CAHRO's member organizations are located represent approximately 2/3's of the population of the State of California.

The Center for Democratic Renewal ("CDR") is a national nonprofit, tax-exempt clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs of research leadership training, community organizing, public education and litigation. With offices in Atlanta, Georgia; Kansas City, Missouri and Seattle, Washington, the CDR also aids the victims of bigoted violence through telephone counseling and emergency assistance. The CDR serves a diverse national constituency of more than 10,000 members and supporters throughout the United States.

Community United Against Violence ("CUAV") is a 13 year old San Francisco-based nonprofit organization dedicated to preventing violence against lesbians and gay

men as well as providing direct services to treat the victims of hate violence against lesbians and gay men. CUAV programs involve victim support, education, and community outreach. CUAV is one of the first organizations of its kind in the United States.

The Human Rights/Fair Housing Commission of the City and County of Sacramento is a government agency responsible for inter-group relations and the maintenance of equal opportunity in such areas as employment and housing.

The International Association of Official Human Rights Agencies is the nonprofit association of statutory human rights and human relation agencies primarily located in the United States and Canada. The United States member agencies are responsible for enforcing a variety of state and local civil rights laws in their respective jurisdictions. Many of the member agencies have responsibility for monitoring, investigating and/or, through educational outreach programs, combatting bias crimes and underlying inter-community tensions which lead to such crimes. A number of the agencies act as advocates for the victims of bias crimes and provide assistance in dealing with the emotional and psychological impact of such crimes. Some member agencies provide training to law enforcement officers in identifying, investigating and resolving bias crimes.

The Los Angeles County Commission on Human Relations is a government agency that was founded in 1944. It is one of the oldest human relations agencies in the United States. Its primary mission is to promote

improved human relations, civic peace, inter-group understanding, and the full acceptance of all persons in all aspects of community life. It is also the Commission's objective to reduce and eventually eliminate inter-group violence, conflict, and tension, as well as discrimination and prejudice based upon race, religion, sex, sexual orientation, national origin, age, disability, or any arbitrary factor.

The National Association of Human Rights Workers ("NAHRW"), organized in 1947, is composed of individuals who are engaged in human and civil rights work as professionals. The NAHRW encourages collection and sharing of ideas and information on the improvement of inter-group relations as well as the exchange of information and research on dealing with racial, religious and ethnic cultural relations.

The National Victim Center is a nonprofit organization based in Washington, D.C., which works with more than 8,000 victims' rights and criminal law organizations across the country. The Center's mission is to promote responsiveness of the criminal justice system to the rights and interest of victims of violent crime through legislation, litigation, and public policy development. The Center also seeks to heighten public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") founded in 1980, provides counseling and advocacy to men and women who have been victims of anti-gay or anti-lesbian violence, sexual assault, domestic

violence, HIV-related violence and other forms of crime. AVP is the only lesbian and gay identified crime victim service provider in New York State, and the only crime victim agency to devote substantial resources to bias-related violence. During 1991, AVP provided services to survivors in 592 cases of anti-gay/lesbian crime, a 93% increase over 1990.

North Carolinians Against Racist And Religious Violence is a statewide nonprofit organization which monitors white supremacist organizations in the state; provides victim assistance; educates on issues of racism and bigotry; and advocates for changes in public policy.

The Santa Clara County Human Relations Commission is a government agency that advocates for and takes affirmative action to eliminate prejudice and discrimination in Santa Clara County, California, based on race, religion, national origin, cultural background, sex, age, sexual orientation or disability, and to promote peace and harmony in the community between individuals and between groups.

FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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Bantam Books, Inc. v. Sullivan,
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Barclay v. Florida,
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Barnes v. Glen Theatre, Inc.,
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Bray v. Alexandria Women's Health Clinic,
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CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigation,
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Coker v. Georgia,
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TABLE OF AUTHORITIES
(Continued)

Page(s)

Dawson v. Delaware,
__ U.S. __, 112 S. Ct. 1093 (1992) 19

Ex Parte Virginia,
100 U.S. 339 (1880) 10

Griffin v. Breckenridge,
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Hishon v. King & Spalding,
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Jacobson v. Massachusetts,
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N.A.A.C.P. v. Alabama,
357 U.S. 449 (1958) 6

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 9

Norwood v. Harrison,
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TABLE OF AUTHORITIES
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Page(s)

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973) 19

Pell v. Procunier,
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Personnel Administrator of Massachusetts v. Feeney,
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Roberts v. United States Jaycees,
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Runyon v. McCrary,
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State v. Beebe,
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State v. Mitchell,
485 N.W.2d 807 (Wis. 1992) 4, 9

TABLE OF AUTHORITIES
(Continued)

	Page(s)
United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983)	9
United States v. Erves, 880 F.2d 376, *cert. denied*, 493 U.S. 968 (11th Cir. 1989)	14
United States v. Griffin, 585 F. Supp. 1439 (M.D.N.C. 1983)	13
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18 U.S.C.	
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Fla. Stat. Ann. § 921.141(5)(k) (1991)	13

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Haw. Rev. Stat. § 706-660.2
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Ill. Rev. Stat. Ch. 38 para. 9-1(b)(1)
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Iowa Code § 707.2 (1991) 14

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Tex. Penal Code Ann. § 19.03(a)(1) (1993) 14

Utah Code Ann. § 76-5-202(k)
(The Michie Co. 1992) 14

Va. Code Ann. § 18.2-31(6)
(The Michie Co. 1992) 14

Wash. Rev. Code § 10.95.020(1) (1991) 14

Wis. Stat. § 939.645 (1992 Supp.) ..... *passim*

Other Authorities

B. Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. L. & Pol'y Rev. 165, 166-168 (forthcoming 1993) 18

National Institute Against Prejudice & Violence, *The Ethnoviolence Project, Institute Report No. 1*, 5 (1986) 21

J. Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 Criminal Justice Ethics 3, (forthcoming 1992) 20

TABLE OF AUTHORITIES
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Page(s)

C. Wexler and G. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986) 22

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-515

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights under Law ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.

The Lawyers' Committee is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to Blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of Blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of

municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

This case raises issues of great importance to the clients served by this *amicus curiae*. The Lawyers' Committee views section 939.645 as an anti-discrimination statute, which, if upheld, will help to protect individual rights. Anti-discrimination criminal laws are a vital link in the chain of legislative and law enforcement efforts to safeguard the civil rights of individuals. The Wisconsin legislature, in enacting section 939.645, has adopted this approach to combat the increasing incidence of discriminatory criminal behavior. The legislature did so while taking great care not to infringe upon guaranteed First Amendment rights. The statute involved in the present case is substantially similar to several existing civil rights and criminal statutes which are consistent with the First Amendment. Section 939.645 should therefore be upheld on analogous grounds.

SUMMARY OF ARGUMENT

The Wisconsin Penalty Enhancement Statute which comes before the Court today, section 939.645(1)(b), Stats. 1989-90, increases the applicable maximum sentence in cases where the defendant selected a victim based on the victim's race or other protected status. No First Amendment rights are implicated by this statute because it is aimed at discriminatory conduct, not speech. The operation of the statute is directly analogous to the operation of civil rights laws which penalize discrimination in employment, education, and public accommodations. Furthermore, enhancing a penalty based

upon the defendant's selection of a particular victim is consistent both with general principles of criminal law and existing criminal statutes. The Federal Sentencing Guidelines, for example, provide for an increased penalty for crimes intentionally directed at a government officer or employee. 18 U.S.C. Appendix 4, § 3A1.2. Section 939.645 should be upheld on precisely the same grounds as the numerous anti-discrimination and criminal statutes which define an offense or punishment in relation to a victim's status. The Court should reaffirm its long-standing teaching that neither discriminatory intent nor discriminatory selection raises any First Amendment issues.

Even if the Court were to conclude that the discriminatory selection of a victim on the basis of the victim's protected status involves expression, the Wisconsin statute should, nonetheless, be upheld. Under *United States v. O'Brien*, 391 U.S. 367 (1968), the state's interest in regulating expressive conduct must be balanced against the individual's right to freedom of expression. Here the state unquestionably has police power to regulate public safety. The Wisconsin legislature could reasonably have concluded that status-dependent crimes, which the statute seeks to regulate, are especially reprehensible, that they produce a greater and more disruptive injury, and that they are particularly difficult to deter; consequently, there can be no question that the legislature was acting within its purview when it enacted this statute. Furthermore, the law is narrowly tailored to address victim selection; any effect that it might have on expressive conduct is incidental at best. Thus, even under the *O'Brien* test, the decision of the Wisconsin Supreme Court should be reversed and the constitutionality of the statute upheld.

ARGUMENT

I. ENHANCING THE PUNISHMENT FOR A CRIME COMMITTED BECAUSE OF THE VICTIM'S RACE OR STATUS DOES NOT HAVE EVEN AN INCIDENTAL EFFECT ON SPEECH.

Section 939.645(1)(b), Stats. 1989-90, subjects a criminal defendant to an enhanced penalty if the defendant "intentionally selects the person against whom the crime is . . . committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . ." It is the commission of a crime against a person selected because of her status that section 939.645 punishes.[1] The statute punishes only conduct.

To come within its reach, section 939.645 plainly requires only (1) that the defendant commit a crime against a victim, and (2) that the defendant have intentionally selected that victim because of that victim's protected status. The statute is not concerned with the actor's speech, or with her views about the victim or the group to which the victim belongs. Like all other anti-discrimination laws, it is concerned only with whether the actor targeted the victim because of the victim's race or other status.

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1 *See State v. Mitchell*, 485 N.W.2d 807, 820 (Wis. 1992) (Bablitch, J., dissenting).

A. Government Regulation of Discriminatory Conduct Does Not Implicate Freedom of Speech.

Section 939.645 closely parallels civil rights laws which impose penalties for discrimination in employment, education, and public accommodations. Civil rights laws penalize otherwise *permissible* conduct (*e.g.*, refusing to employ or rent an apartment to a person) when targeted against individuals who are selected because of their race or other protected status. By the same token, section 939.645 enhances the penalty for engaging in *impermissible* conduct when targeted against individuals who are selected because of their race or other protected status. Title VII of the Civil Rights Act of 1964, for example, bars discrimination "with respect to [the] compensation, terms, conditions, or privileges of employment, *because of* [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Similarly, the Wisconsin statute imposes more severe sentences where a criminal offender selects his victim "because of" the victim's race or other protected status.

This Court has rejected the argument that Title VII impinges on First Amendment guarantees of free speech. In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Court held that a female associate in a law firm could state a claim against the firm under Title VII by alleging she was denied equal consideration for partnership, because such consideration was one of her "terms, conditions, or privileges of employment." The Court dismissed the law firm's contention that such a holding would "infringe constitutional rights of expression or association," because the law firm could not show how its right to free speech "would be inhibited by a requirement that it consider petitioner for partnership on her merits." 467 U.S. at 78.

The Court reached a similar conclusion in *Runyon v. McCrary*, 427 U.S. 160 (1976). *Runyon* rejected a First Amendment challenge to 42 U.S.C. section 1981, which guarantees, *inter alia*, that persons of all races in the United States shall have equal rights to make and enforce contracts. *Runyon* held that section 1981 bars a private, non-sectarian school from selecting students on the basis of race and that, as so applied, the statute does not impinge upon First Amendment rights to freedom of association. The *Runyon* Court recognized that the First Amendment provides a right "'to engage in association for the advancement of beliefs and ideas, . .'" and that a right of association "is protected because it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster." *Id.* at 175, *quoting N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958). While private schools may advocate a belief in school segregation,

> it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, 413 U.S. 455 (1973), "the Constitution . . . places no value on discrimination," *id.*, at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. . . ." *Id.*, at 470. In any event, as the Court of Appeals [in *Runyon*] noted, *"there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."*

Runyon at 176 (emphasis added).

Likewise, Respondent cannot show that the additional penalty imposed on him because of his race-based choice of a victim in any way inhibits his freedom of speech. Respondent was at liberty, under section 939.645, to hurl even the most offensive racial invectives at his victim. Respondent's enhanced penalty, however, stems from his hurling punches rather than words. "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984), *citing Runyon, supra*, 427 U.S. at 175-176 (Minnesota statute requiring Jaycees to accept women as full members did not abridge the male members' freedom of expressive association).

Respondent essentially claims that the government may not impose a penalty on him simply because of his discriminatory intent. This contention is not only at odds with the cases cited above, but also with the Court's interpretation of 42 U.S.C. section 1985(3), an interpretation which was adopted over twenty years ago and reaffirmed earlier this year. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court clarified the scope of section 1985(3), which provides a civil remedy for conspiracy to deprive any person of the equal protection of the laws.[2] The broad sweep of the initial draft of this

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2 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal

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Reconstruction era statute was narrowed by a subsequent amendment, which "centered entirely on the animus or motivation that would be required." *Id.* at 100. Thus:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Id. at 102 (emphasis in original).

Discriminatory animus, therefore, is both an essential and a constitutionally permissible element of section 1985(3). The Court reaffirmed this principle earlier this year when it held that an action to enjoin protestors from obstructing access

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privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

to abortion clinics fell outside the scope of section 1985(3). The Court found that the alleged conspirators lacked the discriminatory motivation required by section 1985(3):

> "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

Bray v. Alexandria Women's Health Clinic, ___ U.S. ___, 61 U.S.L.W. 4080, 4082 (1993) *quoting Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). *See also United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 838 (1983) (holding that section 1985(3) does not reach conspiracies "motivated by commercial or economic animus").[3]

While the preceding discussion has focused on federal civil rights legislation, the same principles apply to state fair employment, fair housing, and similar laws. Many states have

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3 The Wisconsin Supreme Court distinguished civil rights laws from section 939.645 in part on the grounds that section 939.645 provides for criminal penalties, as opposed to civil sanctions. *State v. Mitchell*, 485 N.W.2d 807, 817 (Wis. 1992). The Wisconsin Supreme Court cited no authority for this distinction, and this Court has never endorsed it. Indeed, because the standard of proof for conviction under criminal laws is higher than that for judgments under civil laws, and because the fines available under civil laws may be much greater than under criminal laws, a civil statute affecting free speech may be "'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal law.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-278 (1964) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

had such laws on the books for several decades, and it would be surprising, to say the least, if they were to be held invalid under the First Amendment as applied to the states through the Fourteenth Amendment.[4]

B. Weighing a Defendant's Selection of the Victim in Ascertaining a Criminal Sentence Is Consistent with Other Criminal Statutes.

Section 939.645 is consistent with criminal statutes as well. For example, 18 U.S.C. section 241, a criminal counterpart to 42 U.S.C. section 1985(3), makes it a crime to conspire to intimidate a person from exercising her constitutional rights.[5] As this Court has held, to fall under

4 Of course, federal anti-discrimination laws enjoy a special status under the Constitution. *See Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (holding that the Thirteenth and Fourteenth Amendments, "were intended to be, what they really are, . . . enlargements of the power of Congress"); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (applying a similar interpretation to legislation enacted under the Fifteenth Amendment). Hence, even if this Court were to hold that section 939.645 conflicted with the First Amendment, it would not be a determination that federal anti-discrimination laws authorized by the Thirteenth, Fourteenth, and Fifteenth Amendments were similarly unconstitutional.

5 That section provides, in the relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
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> . . .

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section 241, a defendant "must act *with a specific intent to interfere with the federal rights in question.*" *United States v. Guest*, 383 U.S. 745, 753-54 (1966). For example:

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Id. at 760 (emphasis added).

While the statute makes it a crime to conspire specifically to intimidate a victim from exercising her rights, it does not follow that any particular message is being proscribed. *See CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigation*, 770 F.2d 468, 474 (5th Cir. 1985) (holding that 18 U.S.C. § 112(b)(1-2), which, like section 241, proscribes intimidating persons in certain status-based categories, does not condemn a particular message, but prohibits threatening or intimidating conduct); *see also Boos v. Barry*, 485 U.S. 312, 323-26 (1988) (stating that 18 U.S.C. § 112 is content neutral and narrowly tailored to meet the government's "vital interest in complying with international law").

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> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Title 18 U.S.C. section 245 is yet another example of a criminal statute which proscribes the deliberate targeting of protected groups as one of its elements.[6] Among its other

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6 That statute states, in part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
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> (2) any person because of his race, color, religion or national origin and because he is or has been—
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> (A) enrolling in or attending any public school or public college;
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> (B) participating in or enjoying any benefit, service . . . or activity provided or administered by any State or subdivision thereof;
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> (C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof . . .;
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> (D) serving or attending upon any court of any State in connection with possible service, as a grand or petit juror,
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> (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal or facility of any common carrier by motor, rail, water or air;
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> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel. . . .
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> * * *
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> shall be fined not more than $1,000 or imprisoned not more than one year or both . . . .

18 U.S.C.A. § 245(2).

provisions, it seeks to protect a potential victim who is selected for intimidation, threats, injury, or interference because of her race, color, religion or national origin and because she is engaging in any of various enumerated acts (such as attending a public school, engaging in interstate commerce, or staying at a hotel). At least one lower court decision, *United States v. Griffin*, 585 F. Supp. 1439 (M.D.N.C. 1983), has specifically focused on the scienter requirement of this statute. Far from holding that the specific intent required by the statute violates the constitution, the court concluded that the required specific intent to interfere with federal rights[7] saves the statute from a constitutional attack based on vagueness. *Id.* at 1444.

Moreover, imposing a different punishment on the defendant in this case because he deliberately selected a victim of a particular race is entirely consistent with basic American criminal law principles. Courts routinely consider the intended choice of or effect on a victim both in categorizing particular crimes and in determining appropriate sentences.

Section 939.645 applies where the victim is selected because she is a member of a class specified by the statute. Other criminal statutes similarly enhance the penalty of a criminal offender based on the victim's membership in a specified class.[8] State capital crime statutes typically list

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7 Specifying that a defendant must have the specific intent to interfere with federal rights provided Congress with the authority to enact this legislation. Of course, states acting pursuant to their police powers have much broader authority to regulate criminal conduct.

8 It is commonplace for criminal statutes to take into account a victim's status when defining or punishing a crime. *See e.g.*, Ala. Code § 13A-5-40(a)(5) (1992); Fla. Stat. Ann. § 921.141(5)(k) (1991);

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selection of a police officer as a victim as an aggravating factor which may justify the imposition of the death penalty, and the Court has endorsed this criterion. *See e.g., Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas' capital sentencing procedures under Eighth and Fourteenth Amendments). Similarly, the Federal Sentencing Guidelines provide for an enhanced penalty for offenses committed against a government officer or employee when the offense "was *motivated* by such status." 18 U.S.C. Appendix 4, § 3A1.2 (emphasis added).[9]

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Mass. Ann. Laws Ch. 279 § 69(a)(1) (Lawyers Cooperative Publishing 1993); Or. Rev. Stat. § 163.095(2)(a) (1991); 42 Pa. Cons. Stat. § 9711(d)(1) (1991). Moreover, many such laws which include victim status as an element also include criminal intent to select a victim based on her status as a necessary element. *See e.g.*, Alaska Stat. § 12.55.125(1) (1992); Ariz. Rev. Stat. Ann. § 13-703(10) (The Michie Co. 1992); Ark. Code Ann. § 5-10-101(a)(3) (1992); Cal. Penal Code § 190.2(a)(7) (Deering's 1992); Colo. Rev. Stat. § 18-3-107 (1992); Haw. Rev. Stat. § 706-660.2 (The Michie Co. 1992); Ill. Rev. Stat. Ch. 38 para. 9-1(b)(1) (Smith-Hurd 1979 & Supp. 1990); Iowa Code § 707.2 (1991); Kan. Stat. Ann. §§ 21-3409 & 21-3411 (1991); Mich. Comp. Laws § 28.747(1)(3) (1989); Nev. Rev. Stat. § 200.033(7) (The Michie Co. 1991); N.Y. Penal Law § 125.27(1)(a) (Lawyers Cooperative 1992); Ohio Rev. Code Ann. § 2929.04(a)(6) (Baldwin's 1992); Tenn. Code Ann. § 39-13-204(9) (1992); Tex. Penal Code Ann. § 19.03(a)(1) (1993); Utah Code Ann. § 76-5-202(k) (The Michie Co. 1992); Va. Code Ann. § 18.2-31(6) (The Michie Co. 1992); Wash. Rev. Code § 10.95.020(1) (1991).

9 The Federal Sentencing Guidelines have withstood numerous attacks on their constitutionality. In *Mistretta v. United States*, 488 U.S. 361, (1989), this Court affirmed that the guidelines neither violate the separation of powers doctrine nor constitute an excessive delegation of legislative power. Other courts have likewise upheld the Guidelines against various constitutionally based attacks. *See e.g., United States v. Erves*, 880 F.2d 376, *cert. denied*, 493 U.S. 968 (11th Cir. 1989) (procedural and substantive due process); *United States v. Wayne*, 903 F.2d 1188 (8th Cir. 1990) (constitutionally mandated standard of proof). To (continued...)

Respondent contends that a statute which penalizes the selection of a victim based on that victim's membership in a particular class must violate the First Amendment. Under this view, the choice of a victim because she is a police officer, for example, would also constitute expression protected by the First Amendment. Unless Respondent can provide a principled distinction between these statutes and section 939.645, every state or federal statute which provides stiffer penalties for crimes committed with the intent to injure individuals who are members of particular classes must violate the right to free expression. Respondent, however, cannot provide any support for this position.

In summary, the language of section 939.645 is clearly directed at discriminatory conduct. To run afoul of the statute, one need only be guilty of discriminatory conduct—the statute is not concerned with the motivations or beliefs which led to the discriminatory choice of victim. For example, a rapist who victimizes southeast Asian women might do so because he believes that they are less likely to report his crimes to the police. Or, a mugger who only attacks Jews might do so because he thinks that they have more money than others. These criminals, if convicted of their crimes, can have their penalties enhanced under section 939.645. Both criminals "intentionally select" their victims "because of" their protected status—the first to avoid detection and the second to increase his plunder. On the other hand, a bigot who shouts a string of racial epithets at an African-American is outside of the

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our knowledge, no case has challenged the constitutionality of the Federal Sentencing Guidelines on First Amendment grounds.

statute's reach; her expression is completely unaffected by the Wisconsin statute.[10]

The First Amendment prevents the government from driving "'certain ideas or viewpoints from the marketplace.'" *R.A.V. v. City of St. Paul, Minnesota, supra,* at 2545 n.9 (citations omitted). Section 939.645 does not drive any ideas from the marketplace nor does it strive to; it only seeks to drive status-based crimes from Wisconsin's streets. The marketplace of ideas still remains open to KKK meetings and Nazi rallies.

II. EVEN IF THE COURT WERE TO DETERMINE THAT SECTION 939.645 INCIDENTALLY AFFECTS EXPRESSION, IT DOES NOT VIOLATE THE FIRST AMENDMENT.

Even if this Court were to determine that respondent's violent assault on Matthew Riddick contained a sufficient communicative element to bring it within the scope of the First

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10 In *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S. Ct. 2538 (1992), this Court found a St. Paul ordinance which prohibited "fighting words" that contain "messages of 'bias-motivated' hatred" facially unconstitutional because it prohibited otherwise permissible speech solely on the basis of the subjects that the speech addressed. *Id.* at 2548. *R.A.V.* is distinguishable from the instant case on at least two grounds.

First, the Wisconsin statute is aimed at discriminatory conduct, not expression. The St. Paul ordinance directly targeted "fighting words", which, although outside the normal ambit of First Amendment protection, still constitute a form of expression. *See id.* at 2543-44. *Second*, unlike the St. Paul ordinance, the Wisconsin statute evinces no hostility or favoritism to any particular viewpoint. Rather, the statute targets discriminatory conduct, without regard to the viewpoint that inspired it.

Amendment, section 939.645 is unrelated to the suppression of expression and readily meets the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

A. Statutes That Regulate Conduct Rather Than Speech Are Analyzed Under a Four-Prong Test.

Under well-settled law, the government has a freer hand in restricting conduct combining "speech" and "nonspeech" elements than it has in restricting pure speech. *O'Brien*, 391 U.S. at 376. Where speech and conduct are combined in one course of action, the state's interests in regulating the conduct in question must be balanced against First Amendment rights. In such cases, the statute does not violate the First Amendment if: (1) the regulation falls within the constitutional power of the government; (2) the regulation furthers "an important or substantial governmental interest;" (3) the regulation is "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376-377.

B. Section 939.645 Fully Meets the Four-Prong Test.

Because section 939.645 is narrowly tailored to serve several legitimate and compelling governmental interests which are not aimed at suppressing speech, it does not violate the First Amendment.

1. The State of Wisconsin Clearly Has the Power to Enact Laws Criminalizing Discrimination.

The power of the State of Wisconsin to punish criminal conduct is well established. The legislature clearly has the power to enact laws that are necessary to promote the public health, safety and morals. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Here, in view of the increasing incidence of reported crimes where victims are targeted based on their status[11] and the particular danger of widespread civil unrest resulting from such acts, the Wisconsin state legislature was well within its power to enact section 939.645.

2. Section 939.645 Furthers Several Important Governmental Interests.

The governmental interests served by section 939.645 are compelling. The State of Wisconsin has a substantial interest in penalizing crimes targeted at members of certain groups more than other crimes because, as elaborated below, the legislature could find that they are more reprehensible and socially disruptive, that they have the effect of terrorizing a community, and that they are harder to deter.

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11 B. Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. L. & Pol'y Rev. 165, 166-168 (forthcoming 1993).

a. Section 939.645 Legitimately Protects the Community's Sense That Status-Dependent Crimes Are Inherently More Reprehensible Because of Their Motivation.

The Wisconsin legislature could reasonably have concluded that status-dependent crimes are inherently more reprehensible due to the status-dependent motivation. That the State of Wisconsin has a legitimate interest in enforcing the community's sense of morality is indisputable. This Court has repeatedly upheld the state's power to do so. For example, just two years ago, this Court upheld a public indecency statute under the *O'Brien* test because it furthered "a substantial government interest in protecting order and morality." *Barnes v. Glen Theatre, Inc.*, __ U.S. __, 111 S. Ct. 2456, 2462 (1991). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

Moreover, considering the relative evil of an act in determining the degree of punishment has long been viewed as an appropriate method of determining punishment. In *Barclay v. Florida*, 463 U.S. 939, 949 (1983), for example, the Court held that the defendant's desire to start a race war when he indiscriminately murdered a white hitchhiker was relevant to showing aggravating circumstances. As recently as last year, in *Dawson v. Delaware*, __ U.S. __, 112 S. Ct. 1093, 1097 (1992), the Court reaffirmed its holding in *Barclay* that in capital sentencing the judge may consider "evidence of [the defendant's] racial intolerance and subversive advocacy where such evidence was related to the issues involved." In other words, where a criminal act has been committed, an inquiry into the malevolence of defendant's motivations, including discriminatory animus, is appropriate so that a fitting sentence can be set.

In the instant case, of course, a criminal assault was committed. Absent that assault, defendant's apparent belief that whites are appropriate targets for racial violence would be completely protected. Given that assault, however, a trial court would be fully justified in taking into account that the victim was selected because of his race. A legislature can certainly do the same in enacting penalty enhancement provisions.

b. Status-Dependent Violence Has an *In Terrorem* Effect on Members of the Victim's Community and Is More Socially Disruptive.

The extra punishment given to perpetrators of status-dependent crimes is justified by the extra harm that status-dependent crimes cause. Status-dependent violence transforms the injury into a different type of harm which is more damaging to the victim than the same violent act lacking status-dependent motivation. In addition to the injury inflicted on the victim, these crimes have an *in terrorem* effect on members of the victim's community. As one commentator observed, "The effect of Kristallnacht on German Jews was greater than the sum of the damage of buildings and assaults on individual victims." J. Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 Criminal Justice Ethics 3 (forthcoming 1992).

Not only are status-based offenses more damaging than the same offense lacking such motivation because they terrorize the victim and the community, they are also more damaging because they are more socially disruptive. Take, for example, the disturbance caused by the racially charged Rodney King beating. Alternatively, consider the disruption that occurred when a Korean grocer shot and killed a black girl

in Los Angeles. As one court observed: "Such confrontations . . . readily—and commonly do—escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *State v. Beebe*, 680 P.2d 11, 13 (Or. App. 1984).

Calculating the magnitude of a criminal penalty based on the terroristic or disruptive effect the crime has on the victim or community is in accordance with well-established principles. In *Coker v. Georgia*, 433 U.S. 584, 598 (1977), for example, this Court explained that rape is a crime deserving serious punishment because, among other harmful consequences, rape can "inflict mental and psychological damage" on the victim and, in addition, "undermine[] the community's sense of security." Similarly, in *R.A.V. v. City of St. Paul*, Justice Stevens noted that "[t]hreatening someone because of her race or religious beliefs may cause particularly severe trauma . . .; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team." 112 S. Ct. at 2561 (Stevens, J. concurring).

c. Crimes Motivated by the Status of the Victim May Be More Difficult to Deter Than Other Crimes.

The Wisconsin statute enhances penalties because status-based crimes need to be deterred even more than non-status-based crimes. The State of Wisconsin could reasonably conclude that conventional criminal statues are not effective in deterring status-dependent crimes. Victims of status-dependent crimes are often exposed to a series of attacks and their assaulters are more likely to repeat their attacks than non-status-based assaulters. National Institute Against Prejudice &

Violence, *The Ethnoviolence Project, Institute Report No. 1*, 5 (1986); C. Wexler and G. Marx, *When Law And Order Works*, 32 Crime & Delinquency 205 (1986). Deterrence is clearly a legitimate justification for determining the degree of punishment. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Racial, ethnic and religious-based criminal acts have divided our society throughout history. Such conduct is not merely a relic of the past. In addition to the recent ethnic and racial disruption in our own nation, every day the newspapers report ethnic violence throughout the world—Protestants and Catholics in Northern Ireland; Serbs, Croats, and Bosnians in former Yugoslavia; Kurds and Sunni Muslims in Northern Iraq. Surely, it is within the power of the states to deter such divisive violence in our own nation.

3. Section 939.645 Is Unrelated to the Suppression of Speech.

As the above justifications for the statute illustrate, the State of Wisconsin's interest in punishing crimes motivated by the victim's status are unrelated to the suppression of speech. Quite to the contrary, the state's aim in enacting section 939.645 is solely to combat the devastating effects of violent status-dependent crimes. Protecting society from crimes targeted at individuals because of their membership in identifiable groups is a separate and distinct goal, unrelated to free speech rights.

4. The Incidental Restriction on Speech, if Any, Caused by the Wisconsin Statute Is No Greater Than Necessary to Further the Governmental Interests Served by Section 939.645.

The Wisconsin legislature has narrowly tailored section 939.645 so that the statute only addresses criminal acts directed at individuals because of their race or other status. The statute does not, for example, create a new crime for those who engage in bigoted speech but do not commit crimes. An individual remains free to express his or her discriminatory views by any means other than committing already proscribed crimes. Further, the statute imposes no penalties on bigots who commit crimes which are not in themselves discriminatory. The statute only provides extra penalties for those who commit crimes against the property or persons of protected groups *because* the victims belong to those groups. In doing so, the statute merely codifies the type of judicial consideration long given to status-dependent conduct, which this court has already deemed constitutionally permissible.

CONCLUSION

While this Court "should be eternally vigilant against attempts to check the expression of opinions we loathe," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the Wisconsin statute at issue here poses no such risk. It is an exaggeration to say that imposing an additional penalty for the senseless beating of a fourteen year old boy, because the victim was selected on the basis of his race, even

incidentally affects the "free trade in ideas." *Id.* For these reasons, section 939.645 does not abridge freedom of speech in violation of the First Amendment.

Dated: January 28, 1993.

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FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

STATE OF WISCONSIN,

Petitioner,

- against -

TODD MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE CITIES OF ATLANTA, BALTIMORE, BOSTON, CHICAGO, CLEVELAND, LOS ANGELES, NEW YORK, PHILADELPHIA, AND SAN FRANCISCO, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Beauharnais v. Illinois, 343 U.S. 250 (1952) 26

Bourjaily v. United States, 107 S. Ct. 2775 (1987) 21

Brandenburg v. Ohio, 395 U.S. 444 (1969) 20, 24

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 21

Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989), cert. denied, 496 U.S. 937 (1990) 25

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City of Mobile v. Bolden,
446 U.S. 55 (1980) 14

Collin v. Smith, 578 F.2d
1197 (8th Cir.),
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916 (1978) 20

Dawson v. Delaware, 112
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Fiske v. Kansas, 274
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Gitlow v. New York,
268 U.S. 652 (1925) 20

Griffin v. Breckenridge,
403 U.S. 88 (1971) 14

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 14

Haskell v. Kaman Corp.,
743 F.2d 113 (2d Cir. 1984) 25

Hess v. Indiana,
414 U.S. 105 (1973) 21

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Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 20

In re Winship, 397 U.S.
358 (1970) 13

Leary v. Unites States,
395 U.S. 6 (1969) 25

Leathers v. Medlock, 111
S. Ct. 1438 (1991) 28

Martin v. Ohio,
480 U.S. 228 (1987) 22

Masses Publishing Co. v.
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(S.D.N.Y. 1917) 24

Mt. Healthy Bd. of Education
v. Doyle, 429 U.S. 274
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Mullaney v. Wilbur,
421 U.S. 684 (1975) 13, 17, 22

NAACP v. Claiborne
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U.S. 886 (1982) 20, 24

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Page

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 25

New York Times Co. Co. v. United States, 403 U.S. 713 (1971) 20

Patterson v. New York, 432 U.S. 197 (1977) 17

Police Department of Chicago v. Molsey 408 U.S. 92 (1972) 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 14

R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) 26

Scales v. United States, 367 U.S. 203 (1961) 24

Smith v. Goguen, 415 U.S. 566 (1974) 21

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Texas v. Johnson, 491 U.S. 397 (1989) 19

United States v. Abel, 469 U.S. 45 (1984) 24

United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986) 14

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) 25

United States v. O'Brien, 391 U.S. 367 (1968) 5

United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), cert. denied, 112 S. Ct. 353 (1991) 14

Unites States v. Taylor, 464 F.2d 240 (2d Cir. 1972) 25

United Steelworkers v. Weber, 443 U.S. 193 (1979) 14

Washington v. Davis,
426 U.S. 229 (1976) 14

Whitney v. California,
274 U.S. 357 (1927) 20

State Cases

Kinser v. State,
591 A.2d 894 (Md. App. 1991) 14

People v. Dinan, 461 N.Y.S.2d
724 (N.Y.C. Ct. 1983) 14

People v. Grupe, 532 N.Y.S.2d
815 (N.Y.C. Crim.Ct. 1988) 5, 14

People v. Justice, No. 1-90-1793
(14th Mich. Jud. Dist. Ct.
December 18, 1990) 15

People v. Miccio, 589 N.Y.S.2d
762 (N.Y.C. Crim. Ct. 1992) 5, 14

State v. Beebe, 680 P.2d 11
(Or. Ct. App. 1984) 14

State v. Mitchell, 485 N.W.2d 807
(Wis. 1992), cert. granted, 61
U.S.L.W. 3435 (U.S. Dec. 14,
1992) (No. 92-515) 4, 14, 18

State v. Plowman, 838 P.2d 558
(Or. 1992), petition for cert.
filed, 61 U.S.L.W. 2149 (U.S.
Nov. 23, 1992) (No. 92-6702) 14

State v. Wyant, 597 N.E.2d 450
(Ohio 1992), petition for cert.
filed, 61 U.S.L.W. 3303 (U.S.
Sept. 29, 1992) (No. 92-568) 15

Statutes:

Federal:

18 U.S.C. § 241 14

18 U.S.C. § 242 14

18 U.S.C. § 245 14

42 U.S.C. § 1985(3) 14

Hate Crime Statistics Act of 1990
Pub. L. No. 101-275, 104 Stat. 140
(1990) (codified at 28 U.S.C.
§534 (1992) 5

Fed. R. Evid. 403 25

State:

Cal. Penal Code §664 (West 1988) 17

N.Y. Penal Law § 110.05
(McKinney 1987) 17

N.Y. Penal Law § 240.30(3)
(McKinney 1989) 4

Wis. Stat. §939.645 12

Other Authorities:

Bringing Hate Crime Into Focus, 26
Harv. C.R. - C.L.L. L. Rev.
261 (1991) 7

Crimes of Prejudice: a Matter
of Motive, N.Y. Times,
Nov. 1, 1987 10

George Fletcher, Rethinking
Criminal Law (1978) 17

D. Goleman, As Bias Crimes
Seem to Rise, Scientists
Study Roots of Racism, N.Y.
Times, May 29, 1990 . . . . . 7, 9, 11

Kent Greenawalt, Speech,
Crime and the Uses of
Language (1989) 21

Kent Greenawalt, Criminal
Coercion and Freedom of
Speech, 78 Nw. L. Rev.
1081 (1984) 21

Hyman Gross, A Theory of
Criminal Justice (1979) 17

Victoria L. Handler, Legislating
Social Tolerance: Hate Crimes
and the First Amendment, 13
Hamline J. Pub. L. & Pol'y
137 (1992) 3

Hate Crime Statutes:
A 1991 Status Report 12

Dennis Hevesi, Group Finds
a 65% Rise in Bias Crime,
N.Y. Times, Feb. 27, 1992 8

Graham Hughes, One Further
Footnote on Attempting
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Rev. 1005 (1967) 22

James B. Jacobs, The Emergence
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Hate Crimes Jurisprudence,
22 Israel Yearbook on Human
Rights 39 (1992) 13

Karst, Equality as a Central
Principle in the First
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Rev. 20 (1975) 27

M.R. Kleinfield, Bias Crimes
Hold Steady, But Leave
Many Scars, N.Y. Times,
Jan. 27, 1992 . . . . . 8, 9

W.R. La Fave & A.W. Scott,
Criminal Law (2d ed. 1986) 28

Charles R. Lawrence, The Id,
the Ego, and Equal Protection:
Reckoning With Unconscious Racism,
39 Stan. L. Rev. 317 (1987) 28

Jeffrie G. Murphy, Bias Crimes:
What Do Haters Deserve?, Criminal
Justice Ethics (1992) 18

National Institute Against
Prejudice & Violence,
National Victimization
Survey, 1989 9

New Moves Planned on Bias
Crimes, N.Y. Times,
July 12, 1992, Sec. 13 6

N.Y.C. Department of City
Planning, Population Division,
Feb. 27, 1991, Table 3 2

New York City Police Department Bias
Incident Investigating Unit Report 11

New York Post, Jan. 5, 1993 6

New York Times, Jan. 28, 1992 4

Note, Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence," 99 Yale L.J. 845 (1990) 6

Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270 (1988) 10

Note, Developments in the Law - Sexual Orientation and the Law, 102 Harv. L. Rev. 1508 (1989) 7

Peter E. Quint, Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg, 86 Yale L.J. 1622 (1977) 24

Lynda Richardson, 61 Acts of Bias: One Fuse Lights Many Different Explosions, N.Y. Times, Jan. 28, 1992 10

State of New York, Governor's Task Force on Bias-Related Violence, March 1988 . . . . . 8, 9

Steven J. Schulhofer, Attempt, 1 Encyclopedia of Crime and Justice 97 (Sanford H. Kadish ed. 1983) 22

Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment under Title VII, 58 Brooklyn L. Rev. 1107 (1991) 22

3 Whites Indicted in Burning of a Black, N.Y. Times, Jan. 8, 1993 4

James Weinstein, First Amendment Challenges to Hate Crime Legislation: Where's the Speech?, Criminal Justice Ethics (1992) 27

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When Worlds Collide:
Cultural Conflict and Reported
Hate Crimes in Chicago. A Report
to the Chicago Commission on Human
Relations by Metro Chicago
Information Center, June 9, 1992 6

Rebecca H. White, The Statutory and
Constitutional Limits of Using
Protected Speech as Evidence of
Unlawful Motive Under the National
Labor Relation Act, 53 Ohio State
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No. 92-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

STATE OF WISCONSIN,

Petitioner,

- against -

TODD MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE CITIES OF ATLANTA, BALTIMORE, BOSTON, CHICAGO, CLEVELAND, LOS ANGELES, NEW YORK, PHILADELPHIA, AND SAN FRANCISCO, AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The 1990 census figures for New York City, with its population of 7,322,564, reflect remarkable racial diversity:

43% white nonhispanic, 25% black nonhispanic, 24% Hispanic, and 7% Asian. See N.Y.C. Department of City Planning, Population Division, February 27, 1991, Table 3. In the City of Philadelphia, the 1990 census data show a population which is 52% white nonhispanic, 39% black nonhispanic, 6% Hispanic, and 3% Asian. According to the 1990 Census of Population and Housing published by the Northern Ohio Data and Information Service, Cleveland's population of 505,616 is 48% white nonhispanic, 46% black nonhispanic, and 4% Hispanic. Raw census figures, however, do not do justice to the kaleidoscopic array of nationalities, language groups, lifestyles, backgrounds and beliefs that make up the mosaic of our nations' cities. In a world in which toleration and mutual respect appear at times to be endangered, the fact that the vast majority of Americans of every race, color and creed live together in peace is a sign of hope. Tragically, hate crimes, which inflict unique harm on the victim, the minority community, and society at large, threaten that hope.

Confronted by the challenge to a tolerant society posed by hate crime, New York City began as early as 1980 to address hate crime through the formation of a Bias Incident Investigation Unit in its Police Department. New York City's Human Rights Commission maintains a community relations staff that strenuously endeavors to deal with tensions before they erupt into bias crimes. Responding to similar concerns, the City of Philadelphia Police Department's Conflict Prevention and Resolution Unit, which was created in 1986, investigated 276 allegations of ethnic intimidation in 1992, and 239 such allegations the year before. In each of these years, over 55% of those alleged incidents were deemed to have been well founded. After Ohio's Ethnic Intimidation Law became effective in

1986, the Cleveland Police Department charged its Repeat Offender Program Enforcement Unit ("ROPE") with the responsibility of investigating ethnic intimidation and racially-motivated incidents. This ROPE Unit reported 123 such incidents in 1992. A long-established Community Relations Board in Cleveland has created a number of programs in an effort to promote understanding among the racially and culturally diverse groups within the community. These efforts and similar ones in other cities would be imperiled if legislation did not exist enhancing the criminal penalties associated with such crimes. Enhanced penalties for hate crimes provide increased deterrence and powerful denunciation - critical weapons in the fight against bias-induced violence.

It is our cities that are most threatened by hate crime. Their greatest strength - their astonishing diversity - also makes them most vulnerable to bias crimes. Because our cities have such a major stake in reducing and eliminating bias crime, and because bias crime legislation is the most effective means to redress this problem, it is with a particular urgency, as explained in greater detail below, that Amici urge this Court to reverse the decision of the Supreme Court of Wisconsin.

STATEMENT OF THE CASE AND INTRODUCTION

"The intense fear, anger and utter isolation that must be felt by victims of 'hate crimes' derive from decades, if not centuries, of oppression, [and] discrimination ...." Victoria L. Handler, Legislating Social Tolerance: Hate Crimes and the First Amendment, 13 Hamline J. Pub. L. & Pol'y 137 (1992). Even for those who do not, or cannot, fully understand the depth of anguish produced in the victim,

accounts of bias crimes are horrifying. In this case, a white victim was beaten unconscious because the defendants wanted to "fuck up" a white as revenge for the anti-black racism graphically - and accurately - portrayed in the movie Mississippi Burning. State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992), cert. granted, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992) (No. 92-515).

In Tampa, Florida, three white men abducted a black tourist, robbed him, doused him with gasoline, and burned him on New Year's Day, 1993. Investigatqrs found a note signed "KKK," which read "One less nigger and one more to go." 3 Whites Indicted in Burning of a Black, N.Y. Times, Jan. 8, 1993, at A13.

Just a year ago in the Bronx, a fourteen-year-old black adolescent and his twelve-year-old sister were beaten, robbed, and smeared with white shoe polish by four white teenagers while being told it was "their day to be white." N.Y. Times, January 28, 1992, at B1.

In a case recently heard by the City of New York's Criminal Court under New York Penal Law § 240.30(3) (McKinney 1989),[1] in which the court upheld the constitutionality of New York's bias crime law, three defendants approached two victims. One of the defendants stated, "We don't want any Spics or Niggers in the

[1] Penal Law § 240.30(3) makes it a crime of aggravated assault in the second degree: "when with intent to harass, annoy, threaten or alarm another person, [a person] strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person."

neighborhood," and then punched and kicked them. People v. Miccio, 589 N.Y.S.2d 762 (N.Y.C. Crim. Ct. 1992).[2]

In another case heard by the City of New York's Criminal Court, similarly finding no First Amendment problem with New York's bias-crime law, the defendant struck the victim about his face and body, causing substantial pain in his chest and numbness to his face. This assault was carried out while the criminal defendant shouted ethnic slurs at the victim, including "Is that the best you can do? I'll show you Jew. bastard." People v. Grupe, 532 N.Y.S.2d 815, 817 (N.Y.C. Crim. Ct. 1988).[3]

In an effort to address the nationwide problem of hate crimes, Congress recently passed the Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (1990). The Federal Bureau of Investigation's survey of bias crimes in 1991, even with 18 states not yet participating, tallied

[2] The Miccio court upheld the New York statute prohibiting criminal harassment. The court held that the behavior proscribed by this statute does not involve bias-related fighting words, but rather the defendants' physical actions. Just as the New York Legislature has differentiated the seriousness of other criminal behavior based on the mens rea of the defendant, the court held that the Legislature here properly made the crime of harassment more serious if it is motivated by bias.

[3] Similarly, the Grupe court held that New York Penal Law § 240.30(3) regulates not bigotry, but violent conduct or the threat of violent conduct. Even giving the criminal defendant's arguments "the greatest conceivable latitude" by assuming that defendant's actions contained a sufficient communicative element to create a First Amendment issue, the Grupe court held that the statute satisfied the standard set forth in United States v. O'Brien, 391 U.S. 367 (1968).

4,755 crimes nationwide based on race, religion, or sexual orientation. New York Post, Jan. 5, 1993, at 4. These devastating crimes are indisputably on the rise.[4] See, e.g., Note, Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence," 99 Yale L.J. 845, 845-46 (1990).

The New Jersey Attorney General's office attributes the increase "to difficult economic times" as well as a growing awareness of the state's bias crime reporting system. New Moves Planned on Bias Crimes, N.Y. Times, July 12, 1992, sec. 13, New Jersey Weekly Desk. According to an FBI spokesperson, New York State's high tally of 943 hate crimes in 1991, out of the nationwide total of 4,755, was not a sign that hate crimes occur more in New York State and City than other places. The FBI spokesperson attributed the state's high tally to the fact that New York is "more sensitive to the issue than other states, and New York City, in particular, does a better job of tallying such crimes." New York Post, Jan. 5, 1993, at 4, col. 1. Even if some of the increase in national and local hate crime statistics may be attributed to greater recognition of the problem and better reporting, the figures nationwide

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[4] While the New York City Criminal Court in 1988 noted that the New York City Police Department reported 463 bias crimes in 1987, People v. Grupe, 532 N.Y.S.2d at 819, the New York City Police Department Bias Incident Investigating Unit reported 500 bias cases in 1991 and, for only eleven months of 1992, the statistics have already reached 604. For the five-year period between 1986 and 1991, Chicago reports a total of 1371 hate crimes. When Worlds Collide: Cultural Conflict and Reported Hated Crimes in Chicago, A Report to the Chicago Commission on Human Relations by Metro Chicago Information Center, June 9, 1992.

nonetheless demonstrate an alarming trend. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1.

As demonstrated by the experience of New York City's Bias Incident Investigation Unit, hate crimes are by no means limited to racial incidents. In 1989, the Anti-Defamation League of B'nai B'rith ("ADL") recorded the highest number of incidents of anti-Semitic vandalism, desecration, and harassment since the ADL began counting a decade earlier in 1979. Bringing Hate Crime Into Focus, 26 Harv. C.R.-C.L. L. Rev. 261 (1991). Unfortunately, the 1989 figures have been surpassed by 1991 figures. The ADL reports the even higher total of 1,879 incidents of anti-Semitic vandalism, violence, and harassment in 1991, as reported from forty-two states and the District of Columbia. Brief of Amici Curiae, The Anti-Defamation League, et al., in Support of Petitions for Writ of Certiorari at 6. Similarly, the Department of Justice reported a national increase of sixty-two percent in hate crimes perpetrated against Asians. Brief of the National Asian Pacific American Legal Consortium, et al., as Amici Curiae in Support of the Petition for a Writ of Certiorari at 7.

"[A]ccording to a recent study commissioned by the National Institute of Justice, gay men and lesbians are probably victimized more often than any other minority group." Note, Developments in the Law - Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1541 (1989). In fact, a 1984 study by the National Gay and Lesbian Task Force revealed that twenty percent of gay men and ten percent of lesbians report being physically assaulted because of their sexual orientation. Id. In 1989 alone, this

task force reported 7,031 incidents of anti-gay violence nationwide.

Moreover, statistics measuring bias crimes may well understate the extent of such crimes. According to Howard Ehrlich, director of research at the National Institute Against Prejudice and Violence, perhaps 80 percent of bias incidents are not reported, chiefly because victims feel nothing will be done. M.R. Kleinfield, Bias Crimes Hold Steady, But Leave Many Scars, N.Y. Times, Jan. 27, 1992, at A1. For instance, although the New York City Police Department recorded only 88 anti-gay crimes in 1991, 592 such crimes were reported to the Gay and Lesbian Anti-Violence Project in the same time period. Dennis Hevesi, Group Finds a 65% Rise in Bias Crime, N.Y. Times, Feb. 27, 1992, at B4.

Whether based on race, color, religion, national origin, or sexual orientation, bias crimes tear at the very fabric of a democratic, pluralistic society.

> Acts of bias-related violence are directed not at individuals solely, but at the group of which the victim is perceived to be a member. Because of this, both the victim and the community are depersonalized, isolated, violated and robbed of the sense of security required if one is to live, work, play, pray, or interact in any sustained or substantive manner in a society composed of diverse groups.

State of New York, Governor's Task Force on Bias-Related Violence, March 1988 at 1. These crimes produce devastating effects. Victims of bias crimes suffer 21% more

psychological and physiological symptoms than victims of non-bias related crimes. National Institute Against Prejudice and Violence, National Victimization Survey, 1989. Victims recount that bias crimes leave a residue of painful distrust and fitful dreams. M.R. Kleinfield, Bias Crimes Hold Steady, But Leave Many Scars, N.Y. Times, Jan. 27, 1992, at A1. Because hate crimes are frequently vicious, their victims are hospitalized four times more often than victims of other assaults. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1.

The State of New York, Governor's Task Force on Bias-Related Violence heard testimony from victims of bias crimes, which paralleled the findings of a study of bias victims conducted by the National Institute Against Prejudice & Violence.

> The intensity of feeling and range of negative reactions was striking. Recent immigrants were disillusioned about America. Many individuals and families became isolated, withdrawn and paranoid out of fear. Others were overcome by anger and revenge fantasies. Some fought ceaselessly to stymie feelings of hatred for their attackers. Sadness and powerlessness characterized others.

Governor's Task Force Report at 5, citing National Institute Against Prejudice & Violence, The Ethnoviolence Project, Institute Report No. 1 (1986).

Bias crimes also have a devastating impact on communities. Such crimes "generate widespread fear and

intimidation within and between communities, affecting many more individuals than the victim and his immediate acquaintances." Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270, 1280 (1988) (hereinafter "Combatting Racial Violence"). "A bias crime is like no other crime . . . . A normal crime affects the victim, perhaps his family and friends. But a bias crime goes beyond and can affect the whole community, the whole city." Crimes of Prejudice: a Matter of Motive, N.Y. Times, Nov. 1, 1987, at E6, col. 3 (quoting Michael Markman, Commander of New York City Police Department Bias Incident Investigating Unit).

A further effect on communities is the tendency of bias crimes to incite further violence. Combatting Racial Violence, 101 Harv. L. Rev. at 1280-81. For example, following the beating in the Bronx of two minority youths on January 6, 1992, the Bronx experienced more bias crimes in January than in the previous four months combined according to the New York City Police Department Bias Incident Investigating Unit Incident Report 1992. In New York City, nine bias-related incidents occurred over the weekend after the stabbing death of an Hispanic student. N.Y. Times, March 16, 1992, at B3. After racial disturbances in the Crown Heights section of Brooklyn following a car accident in August 1991 in which a Jewish driver struck and killed a black child, reports of bias incidents rapidly increased that month. Lynda Richardson, 61 Acts of Bias: One Fuse Lights Many Different Explosions, N.Y. Times, Jan. 28, 1992, at B1, col. 2. Similar surges followed the 1990 dispute between a Korean grocer and a black customer in Flatbush, Brooklyn; in 1989, following the shooting of Yusuf Hawkins, a black teen-ager in Bensonhurst, Brooklyn; and in 1986, following the killing

of Michael Griffith, a young black man chased into highway traffic in Howard Beach, Queens. Id.

A disturbing characteristic of these crimes is the high incidence of juvenile offenders, a characteristic which underscores the need to send a message that bias crimes are reprehensible. Most of the perpetrators of bias crimes are in their teens or twenties. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1. In New York City, in the three-year period from January 1, 1987 to December 31, 1990, the Bias Incident Investigation Unit investigated 2,084 confirmed bias incidents. A total of 1,076 arrests were made; 687, or 63.8%, of the persons arrested were under the age of 20. N.Y.C. Police Department Bias Incident Investigation Unit Report at 1. In Chicago, of the 288 hate crimes reported in 1992, at least 57 cases involved juveniles as victims or offenders. In one case the offender was nine years old. Bias Crime Report 1992, Chicago Commission on Human Relations (forthcoming). A pressing need thus exists for society, through its legislatures, to send a message to our young, as well as others, that bias crime cannot be tolerated.

As Governor Cuomo stated in an August 15, 1991 open letter to members of the New York State Legislature in seeking support for New York's Bias Related Violence and Intimidation Act, "[a]s government, our single most effective weapon is the law. I implore you to ... make it clear to the people of this state that behavior based on bias will not be ignored or tolerated." Because of the deterrent effect and essential message of such legislation, and, more significantly, because such legislation does not violate the First Amendment, as is set forth in the Argument below,

Amici urge this Court to reverse the decision of the Supreme Court of Wisconsin.

ARGUMENT

WISCONSIN'S DECISION TO IMPOSE ENHANCED CRIMINAL PENALTIES ON DEFENDANTS WHO VIOLENTLY ASSAULT VICTIMS BECAUSE OF THEIR RACE DOES NOT VIOLATE THE FIRST AMENDMENT.

Wisconsin is one of forty-four[5] states to single out bias-motivated crimes[6] for enhanced sentencing or separate status, reflecting a widely-shared legislative judgment that bias-motivated crimes pose a unique threat to a tolerant society.[7]

This Court has explicitly upheld consideration of bias motivation by a sentencing judge in a capital case, as long as the principles of relevance and freedom of association are respected. Dawson v. Delaware, 112 S. Ct. 1093 (1992); Barclay v. Florida, 463 U.S. 939 (1983). While Wisconsin imposes its enhanced sentence pursuant to statute rather than judicial sentencing discretion, no basis exists to distinguish between a judge and the legislature in this regard. If anything, a uniform legislative judgment enhancing sentence for bias-motivated crimes is preferable to ad hoc exercises of judicial discretion. Even more importantly, when the enhancement is created by statute, the issue of causation by culpable mental state becomes an element of the offense, vesting the accused with crucial procedural protections that are often absent from the sentencing process. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975).

In identifying race-based animus as an important factor in assessing the legal consequences of criminal conduct,[8] Wisconsin follows a well-trodden path in

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[5] According to the Anti-Defamation League, 32 states have enacted legislation similar to Wisconsin's enhancing the penalties for bias-motivated crime, and 12 states have enacted legislation singling out bias-motivated crime for special status. Hate Crimes Statutes: A 1991 Status Report (Report of the Anti-Defamation League).

[6] Wisconsin's statute enhances penalties for a wide range of criminal behavior when the defendant:

> "intentionally selects the person against whom the crime is committed...because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person...". Wis. Stat. §939.645.

[7] The wisdom of such a legislative judgment is, of course, not a question for this Court. For a critical view of the wisdom and efficacy of so-called hate crimes legislation, see James B. Jacobs, The Emergence and Implications of American Hate Crimes Jurisprudence, 22 Israel Yearbook on Human Rights 39 (1992).

[8] While amici believe that the Wisconsin statute is constitutional in all its potential applications, this case involves only the constitutionality of the statute as applied to a violent assault unquestionably motivated by the victim's race.

American law. Congress, the states and virtually every level of local government have enacted civil and criminal statutes punishing behavior motivated by discriminatory animus.[9]

Nonetheless, a majority of the Supreme Court of Wisconsin ruled that augmenting a sentence for a bias-motivated assault punishes a defendant, not for his acts, but for his evil thoughts and hateful words in violation of the First Amendment.[10]

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[9] See, e.g., 18 U.S.C. §§ 241; 242 and 245. United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), cert. denied, 112 S. Ct. 353 (1991); United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986). See also 42 U.S.C. § 1985(3); Griffin v. Breckenridge, 403 U.S. 88 (1971). Other examples of statutes singling out bias-based motivation as a key to liability are Title VII, prohibiting discrimination in employment and Title VIII forbidding discrimination in the sale or rental of housing. Compare United Steelworkers v. Weber, 443 U.S. 193 (1979) (no liability for good faith affirmative action plan) with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (liability for stereotypical promotion criteria). This Court has even held that disparate harm alone is not sufficient to establish a violation of the Fourteenth Amendment or the Voting Rights Act in the absence of proof of a culpable mental state. Compare Washington v. Davis, 426 U.S. 229 (1976) and City of Mobile v. Bolden, 446 U.S. 55 (1980) with Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[10] State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), reversing 473 N.W.2d 1 (Wis. Ct. App. 1991).

The Supreme Court of Oregon upheld a similar statute in State v. Plowman, 838 P.2d 558 (Or. 1992), petition for cert. filed, 61 U.S.L.W. 2149 (U.S. Nov. 23, 1992) (No. 92-6702). See also State v. Beebe, 680 P.2d 11 (Or. Ct. App. 1984). Lower courts in New York and Maryland have also upheld bias-enhancement provisions against constitutional attack. People v. Dinan, 461 N.Y.S.2d 724 (N.Y.C. Ct. 1983); People v. Grupe, 532 N.Y.S.2d 815 (N.Y.C. Crim. Ct. 1988); People v. Miccio, 589 N.Y.S. 2d 762 (N.Y.C. Crim. Ct. 1992); Kinser (continued...)

The Wisconsin Court was, of course, correct in asserting that the First Amendment forbids "thought crimes." Mere thought, even when it is outwardly manifested as speech and association, can never give rise to criminal liability -- unless it ripens into unlawful action. Dawson v. Delaware, 112 S. Ct. 1093; Fiske v. Kansas, 274 U.S. 380 (1927). As the Chief Justice noted in Dawson, "abstract beliefs" that do not ripen into unlawful action cannot be punished. 112 S. Ct. at 1098.

But where, as here, serious criminal activity has concededly occurred, the First Amendment does not prevent the state from seeking to isolate the defendant's racial bias as the operative cause of the criminal activity in order to deter, punish, and denounce it.

Amici believe that the well-intentioned refusal of the court below to permit Wisconsin to enhance sentences in bias-motivated crimes was premised on three serious misconceptions.

First, the majority incorrectly treated a criminal defendant's biased mental state and his criminal act as wholly separate and independent concepts. In fact, under the Wisconsin statute, the defendant's bias must be shown to be the cause of his criminal act, thus inextricably linking the two as integral components of a crime.

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[10] (...continued)
v. State, 591 A.2d 894 (Md. App. 1991). Courts in Michigan and Ohio have ruled them invalid. State v. Wyant, 597 N.E.2d 450 (Ohio 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568); People v. Justice, No. 1-90-1793 (14th Mich. Jud. Dist. Ct., December 18, 1990).

Second, the majority misapplied the central distinction between speech and action that underlies the First Amendment. Properly understood, the Wisconsin statute punishes action, not speech.

Finally, the majority confused a concern with the nature of the evidence admissible to prove that bias actually caused the crime with the legitimacy of considering bias motivation at all in assessing sentence.

A. The Wisconsin Supreme Court Incorrectly Viewed Defendant's Biased Mental State and His Criminal Act as Wholly Separate and Distinct Concepts. In Fact, Since Wisconsin Must Prove That Defendant's Racial Bias Caused the Unlawful Act, Bias is an Integral Component of the Crime.

The Wisconsin Supreme Court correctly noted that the defendant would not have been subjected to an enhanced sentence but-for his racial bigotry. Thus, the court reasoned, the enhanced punishment was really for defendant's evil thoughts and words, not his evil deeds. In effect, the court treated Wisconsin's statute as establishing two separate offenses - the crime of aggravated assault and the crime of racial bigotry.

If, in fact, the Wisconsin statute purported to make bigotry a crime, the statute would indeed violate the First Amendment. Dawson v. Delaware, 112 S. Ct. 1093. But Wisconsin's statute does not punish racial bigotry as such. Defendant's racial bigotry is relevant solely because it was

the operative cause of a serious crime. In order to invoke the enhanced penalty, the state must prove beyond a reasonable doubt that defendant harmed his victim because of his race. Mullaney v. Wilbur, 421 U.S. 684. Thus, defendant's racial animus and his criminal assault are not two independent crimes that happen to be linked by a single indictment. They are yoked together by a requirement that the state prove beyond a reasonable doubt that the assault was caused by the defendant's racial bias. Unless such a causal link can be proved beyond a reasonable doubt, defendant's views on race are irrelevant. On its own terms, therefore, the state court's treatment of the Wisconsin statute as creating a separate crime of bigotry is untenable. The Wisconsin Court overlooked the fact that but-for defendant's bigotry, he would not have incited the assault.

Moreover, the Wisconsin Court's insistence that the First Amendment requires Wisconsin to ignore a defendant's mental state in assessing blameworthiness is unprecedented. In fact, the seriousness of criminal behavior traditionally turns on two variables: the harm caused by the act and the culpability of the mental state of the actor.[11] See George Fletcher, Rethinking Criminal Law (1978); Hyman Gross, A Theory of Criminal Justice (1979).

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[11] The law of homicide is an example of seriousness varying with the defendant's mental state, even though the harm is identical whether or not the homicide was premeditated. See Patterson v. New York, 432 U.S. 197 (1977). The law of attempts is an example of seriousness varying with harm, even though the defendant's mental state is identical whether or not the attempt succeeds. E.g., Cal. Penal Code § 664 (West 1988); N.Y. Penal Law § 110.05 (McKinney 1987).

In this case: (1) but-for bias there would have been no criminal act; (2) bias-motivated crime causes independent harms both to the victim and to society; and (3) bias-motivated crime is a legitimate target for enhanced general and specific deterrence. Thus, the Wisconsin Court's refusal to permit mental state to be considered in imposing sentence is completely contrary to traditional practice. Barclay v. Florida, 463 U.S. 939 (permitting sentencing judge to consider biased motivation for homicide).

In an effort to distinguish the Wisconsin statute from the widespread consideration of mental state as a factor in determining the seriousness of criminal behavior, the Wisconsin court sought to erect a set of elaborate semantic distinctions between and among "intent," "purpose," and "motive." State v. Mitchell, 485 N.W.2d at 813, n.11. Linking sentence to "intent" and "purpose" is proper, argued the court; but linking sentence to "motive" impermissibly endangers the First Amendment. Id. Such an approach fails for at least two reasons. First, it is doubtful whether legal distinctions of constitutional consequence can be premised on purported distinctions between and among intent, purpose, and motive. See Jeffrie G. Murphy, Bias Crimes: What Do Haters Deserve?, Criminal Justice Ethics 20, 22 (1992). According to the court, each has a fixed, objective meaning. In fact, the three concepts blend into one another depending upon the level of generality at which each is addressed. For example, the court characterized the defendant's "intent" as the knowing infliction of force on the victim and the defendant's "motive" as the wish to harm white people. State v. Mitchell, 485 N.W.2d at 813 n.11. But the so-called categories can be manipulated by simply re-characterizing defendant's "intent" or "purpose" as the knowing infliction of harm on a white person. The

differences between and among intent, purpose, and motive, while helpful for purposes of academic analysis and policy debate, are too subject to semantic manipulation to bear the weight of constitutional consequence imposed on them by the Wisconsin court.

Second, even if it were possible to isolate motive from purpose and intent as an objective matter, no basis exists to immunize motive from legal scrutiny when it is causally linked to a serious crime. For example, the defenses of duress, justification, and self-defense recognize that "innocent" motives may cause a crime.[12] This case is the obverse of such exculpatory use of innocent motive. In this case, the motive that caused the crime is blameworthy, not innocent. The consequence is enhanced sentence, not exoneration.

B. The Wisconsin Supreme Court Misapplied the Central Distinction Between Speech and Action That Underlies First Amendment Protection.

The Wisconsin court was clearly correct in recognizing that thought, speech, and association are accorded uniquely protected status in our law. In the absence of an act causing harm, thought, speech and association are immune from criminal sanction, no matter how abhorrent the content. E.g., Texas v. Johnson, 491 U.S. 397, 414 (1989);

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[12] Of course, in these settings, motive is put into evidence by the defendant. The principle that motive, when inextricably linked to the act, need not be ignored remains operative in both instances.

Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

Moreover, we narrowly limit the nature of the harm that can be ascribed to speech and association. We do not, for example, recognize anger, offense, or even emotional distress as a cognizable harm justifying censorship. Hustler Magazine v. Falwell, 485 U.S. 46 (1988). Nor, in the absence of incitement, do we ascribe the anti-social acts of hearers to a speaker. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).[13]

Third, we require proof of an extraordinarily close causal nexus between First Amendment behavior and an alleged harm flowing from it before the First Amendment activity can be suppressed. New York Times Co. v. United States, 403 U.S. 713 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, JJ, dissenting); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis and Holmes, JJ, concurring).

[13] This case is a classic example of the principle. Defendant committed aggravated assault after viewing Mississippi Burning, a searing indictment of white racism. Under a strict but-for test of causation, the movie "caused" the assault. In some societies, such a link would justify the imposition of civil and criminal sanctions on the speaker. We recognize that once an idea leaves a speaker's control, he cannot be held legally responsible for its use - or abuse - by third persons, both because it is fundamentally unfair to do so and because it would generate enormous self-censorship.

Finally, we impose rigorous procedural requirements of timing, fair notice, precise drafting, narrow tailoring, and equal treatment on any effort to regulate First Amendment behavior.[14]

Thus, no defendant can be punished simply because he is a bigot, no matter how offensive his thoughts, speech, or behavior. Nor can a defendant be punished because his bigotry or his speech, standing alone, is especially offensive to members of the victim group. Nor can a defendant be punished merely because his bigotry or his speech may lead to future harmful acts. Dawson v. Delaware, 112 S. Ct. 1093; Brandenburg v. Ohio, 395 U.S. 444; Hess v. Indiana, 414 U.S. 105 (1973).

But there is no immunity in our law for thought, speech, or association when they are integral components of unlawful acts. A criminal conspiracy is a classic exercise in association. Yet, if the requisite "act in furtherance" takes place, the very act of associating becomes an integral component of a crime. E.g., Bourjaily v. United States, 107 S. Ct. 2775 (1987). Similarly, the verbal message underlying blackmail, extortion, and intimidation is plainly speech. But the fear caused by such speech renders it an integral component of a criminal act. Kent Greenawalt, Speech, Crime and the Uses of Language, (1989); Kent Greenawalt, Criminal Coercion and Freedom of Speech, 78 Nw. L. Rev. 1081 (1984).

[14] See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (unequal treatment); Smith v. Goguen, 415 U.S. 566 (1974)(vagueness); Broadrick v. Oklahoma, 413 U.S. 601 (1973)(overbreadth).

Even a defendant's mental process is not beyond the legitimate scope of the criminal law when it is an integral component of a criminal act. For example, the law of homicide assesses the blameworthiness of an act causing death only after considering the mental state of the defendant. E.g., Mullaney v. Wilbur, 421 U.S. 684; Patterson v. New York, 432 U.S. 197; Martin v. Ohio, 480 U.S. 228 (1987).[15]

Wisconsin's enhanced sentencing statute operates only when the defendant's bias is an integral part of an act causing criminal harm. Unlike settings where speech is protected from sanction because doubt exists concerning the causal nexus between the speech and harmful conduct, Wisconsin invoked its statute in this case only after it was proven beyond a reasonable doubt that defendant's racial bias was the operative cause of the crime.[16] Thus, under

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[15] Our criminal tradition even recognizes liability for attempting to commit an impossible act when no discernible harm is caused by the attempt. In the "impossible attempt" cases, criminal liability is predicated solely on the actor's guilty mental state and his demonstrated dangerousness. Steven J. Schulhofer, Attempt, 1 Encyclopedia of Crime and Justice 97 (Sanford H. Kadish ed. 1983). See Graham Hughes, One Further Footnote on Attempting the Impossible, 42 N.Y.U. L. Rev. 1005 (1967).

[16] The assault in this case was clearly motivated by racial animus. No other motive was even arguably present. In other cases, more than one motivating factor may be present - greed and racial animus, for example. This Court has generally imposed a but-for test of causation in mixed motive cases, requiring proof that the act would not have taken place but-for the illicit motive. E.g., Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII, 58 Brooklyn L. Rev. 1107 (1991). See Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274 (1977).

the Wisconsin statute, the bias-related motive causes the criminal act and, therefore, is an integral part of the criminal act, just as the speech of a blackmailer is an integral part of that crime. Properly understood, Wisconsin's statute does not penalize thought; it merely recognizes that where racial bias demonstrably causes unlawful harm, the bias is an integral part of the criminal act for the purpose of assessing blame, imposing punishment, and achieving deterrence.

C. Since the First Amendment and Principles of Evidence Limit the Proof Admissible to Show That a Crime Was Actually Caused by Racial Bias, the Trial of an Alleged Hate Crime Does Not Constitute an Impermissible Threat to Freedom of Speech.

The Wisconsin court feared that defendant's past speech and association would play an impermissible role in determining whether a crime was bias motivated. The court reasoned that once the issue of bias motivation enters the case as an element of the offense, evidence of prior First Amendment behavior, including speeches, associations, even reading matter, might become admissible at trial to prove the existence of discriminatory motive. The net effect might be to place defendants on trial for their past controversial thoughts.

The concern that trial of alleged bias-motivated crimes may involve improper intrusions into defendant's protected thoughts and associations is a real one. Fortunately, adequate evidentiary safeguards exist.

In this case, the evidence of bias motivation was a statement by the defendant: "You all want to fuck somebody up? There goes a white boy; go get him." 485 N.W.2d at 809. The evidentiary use of such a statement poses no threat to First Amendment values. As a direct incitement to violence, the statement itself was not protected. Brandenburg v. Ohio, 395 U.S. at 446; Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (per Learned Hand). Moreover, the statement is directly related to the incident at issue and was immediately followed by the very lawlessness it incited. See NAACP v. Claiborne Hardware Co., 458 U.S. 886.

Nor should intrusive evidentiary issues arise in other cases. This Court has recognized that the First Amendment itself imposes a significant evidentiary brake on any attempt to use protected speech and association as evidence of crime. Dawson v. Delaware, 112 S. Ct. 1093; Brandenburg v. Ohio, 395 U.S. 444; Scales v. United States, 367 U.S. 203 (1961). See also United States v. Abel, 469 U.S. 45 (1984) (permitting evidence of membership in prison gang to impeach, but not to prove liability); Peter E. Quint, Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg, 86 Yale L.J. 1622 (1977); Rebecca H. White, The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act, 53 Ohio State L.J. 1 (1992). While the First Amendment evidentiary rule is not absolute, it imposes a duty on the trial judge to weigh the probative value of evidence of First Amendment activity against the prejudicial impact on First Amendment values.

Moreover, traditional evidentiary principles codified in Rule 403 of the Federal Rules of Evidence, adopted by Wisconsin, impose significant limits on evidence about a defendant's past beliefs and associations. The Wisconsin statute aims at crimes actually caused by bias. Courts, confronted with the task of trying Title VII and similar cases have distinguished between evidence immediately relevant to defendant's state of mind and efforts to intrude into a defendant's past First Amendment activities. Dawson v. Delaware; Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989) (distinguishing between statements directly related to incident and general speeches), cert. denied, 496 U.S. 937 (1990); Haskell v. Kaman Corporation, 743 F.2d 113 (2d Cir. 1984); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990). Indeed, evidence of bias that does not relate immediately to the incident at issue is of such minimal probative value that, standing alone, it should not even satisfy the State's production burden. Leary v. United States, 395 U.S. 6 (1969); United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

Given the First Amendment evidentiary rule, Rule 403, and the need to tailor the evidence to proof of immediate causation, bias-motivation trials should not prove unduly intrusive. In the absence of a serious danger of systematic intrusion, the Wisconsin Court's invocation of the First Amendment overbreadth doctrine to strike down the Wisconsin statute on its face was clearly improper. New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

D. This Court's Decision in R.A.V. v. City of St. Paul Does Not Justify Invalidation of Wisconsin's Decision to Enhance Sentences for Bias-Motivated Crimes.

Strictly speaking, the decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), invalidating a St. Paul hate-speech ordinance has little or nothing to do with this case. The substantive First Amendment issue posed by R.A.V. was whether the psychological harm to victims caused by hate-speech is sufficiently grave and sufficiently certain to justify making hate-speech a crime. Beauharnais v. Illinois, 343 U.S. 250 (1952). This Court found it unnecessary to resolve that issue: five members of the Court found the St. Paul ordinance invalid on its face because it regulated speech on the basis of content, 112 S. Ct. at 2547-50, and four members of the Court found it invalid because it was overbroad. 112 S. Ct. at 2558. Despite the obvious difference between a statute criminalizing speech and a statute penalizing criminal acts, the state court apparently believed that the reasoning of the five person majority in R.A.V. dooms any effort to single out bias-motivated crimes for enhanced penalties. Since, the Wisconsin court reasoned, this Court in R.A.V. barred St. Paul from singling out biased speech for differential regulation, it also barred the state from singling out biased conduct for differential regulation.

But the ban on content-based censorship invoked by the Court's majority in R.A.V., is triggered only when the state seeks to regulate speech. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). Such limits are designed to assure that unpopular speech will not be singled out for

discriminatory censorship. See generally Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975). Accordingly, the majority in R.A.V. held that biased and unbiased speech must be regulated equally.

Where, however, as here, the state regulates conduct, not speech, it may treat biased and unbiased conduct differently as long as a justifiable basis exists for doing so. A justifiable basis clearly exists. See, James Weinstein, First Amendment Challenges to Hate Crime Legislation: Where's the Speech?, Criminal Justice Ethics 6-20 (1992).

Bias-motivated violence spawns hatred, retaliation and social disintegration. Bluntly put, it is a form of social terrorism. Victims of bias-motivated assaults suffer alienation, fear, and anguish that often exceed their visible bodily injuries. Members of the victim's community share the pain, since they must live with the fear that their skin color may make them targets for similar violence. Finally, third-persons are likely to react violently to bias-motivated violence, seeking either revenge or emulation. Thus, the Wisconsin legislature had at least a rational basis for the decision, shared by forty-three other states, to impose enhanced sentences for bias-motivated crimes.

Moreover, Wisconsin's statute satisfies even the strict equality standard applicable to content-based regulation of speech. In R.A.V., the Supreme Court of Minnesota sought to justify its hate-speech ordinance as a device to regulate "fighting words." The majority of this Court reasoned that since fighting words could take the form of both biased and non-biased speech, the only justification for banning biased fighting words while permitting non-biased fighting words was hostility to the biased speaker's message. 112 S. Ct. at

2548. Where, however, as here, a distinction between bias-motivated and non-bias-motivated criminal conduct is justified by a state's legitimate regulatory interests in deterrence and retribution, even the R.A.V. majority would authorize differential treatment. 112 S. Ct. at 2546. See also Leathers v. Medlock, 111 S. Ct. 1438 (1991).

Our growing understanding of the psychological underpinnings of racial prejudice suggests its terrible power as a motivating force. See generally Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 328-339 (1987). Increasing the penalty for crimes motivated by such a potent psychological drive is a classic effort to achieve augmented deterrence - both general and specific. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law (2d ed. 1986).

Nothing in this society's commitment to freedom of speech requires us to ignore the patent difference between vandalism and Kristallnacht. Hate crimes impose unique harms. Wisconsin's attempt to respond to those harms with increased deterrence and augmented denunciation does not violate the First Amendment.

CONCLUSION

THE DECISION OF THE SUPREME COURT OF WISCONSIN SHOULD BE REVERSED.

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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Chicago Lawyers' Committee") was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims.

Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned. The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statute struck down by the Wisconsin Supreme Court, particularly because of its similarity to the bias violence statute in Illinois.

ARGUMENT

The Wisconsin Supreme Court struck down Wisconsin's bias violence statute on the ground that it violated the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). But the First Amendment is not even implicated in, much less violated by, Wisconsin's bias violence statute.

The Wisconsin statute authorizes the imposition of increased maximum penalties if the person committing the crime "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual-orientation, national origin or ancestry of that person . . . ." Wis. Stat. § 939.645(1)(b) (1989-90). Discriminatory selection of the victim—selection based on the victim's status—is the essential element of the statute. Expression—whether speech or expressive conduct—is simply not an element at all.

The decision of the Wisconsin Supreme Court is directly contrary to this Court's decision last term in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). In *R.A.V.*, this Court clearly stated: "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. The St. Paul, Minnesota ordinance at issue in *R.A.V.* was, by its terms, directed at the content of expression. Indeed, it regulated expression based on the viewpoint contained in the message. In contrast, the Wisconsin statute is directed at conduct without regard to expression. The Wisconsin statute does not in any way restrict the ability of a person to believe anything, to hate anyone, or to express any point of view; it simply

punishes the act of committing a crime against someone because of that person's status. As Justice Abrahamson aptly stated in her dissent in *Mitchell*: "[T]he statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct." 469 Wis. 2d at 181, 485 N.W.2d at 819.

The decision of the Wisconsin Supreme Court is also inconsistent with this Court's decision last term in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, this Court held that the Constitution does not preclude the admission of relevant evidence "concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. *See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding admission of evidence of racial animus in capital sentencing proceeding). There is no logical or legal basis for allowing a judge or jury to consider discriminatory victim selection in determining the imposition of criminal penalties while forbidding a legislature from doing so.

Moreover, the Wisconsin Supreme Court's decision cannot be reconciled with this Court's analysis of the constitutionality of antidiscrimination laws in *R.A.V.* Citing a series of federal antidiscrimination laws, this Court noted that "words can in some circumstances violate laws directed not against speech but against conduct . . . ." 112 S. Ct. at 2546. This Court held, however, that so long as conduct is not singled out "on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Yet, that is precisely what the Wisconsin Supreme Court has done.

There is no principled distinction between the Wisconsin bias violence statute and the federal antidiscrimination laws cited with approval by this Court in *R.A.V.* The essential element in both is discriminatory selection of the victim—selection based on the victim's status. Indeed, the operative language in the Wisconsin bias violence statute is the same as or substantially similar to the operative language in many federal antidiscrimination laws. *Compare* Wis. Stat. § 939.645(1)(b) (1989-90) ("because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person") *with* 42 U.S.C. § 2000e-2(a)(1) (1988) ("because of such individual's race, color, religion, sex, or national origin").

As Justice Bablitch tellingly questioned in his dissent in *Mitchell*: "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?" 469 Wis. 2d at 183, 485 N.W.2d at 820. The answer is: it cannot. The decision of the Wisconsin Supreme Court is based on a seriously erroneous reading of the limits imposed by the First Amendment, and it is plainly inconsistent with this Court's recent decisions in *R.A.V.* and *Dawson*.

CONCLUSION

Nothing threatens to unravel the fabric of our heterogeneous society more than violence directed at persons because of characteristics such as their race or religion. Yet, under the mistaken belief that the First Amendment prevents the states from providing a remedy for bias violence, the Wisconsin Supreme Court struck down a statute that provides such a remedy. This Court should reverse the decision of the Wisconsin Supreme Court and make clear that the First Amendment does not bar the states from providing a remedy for bias violence.

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FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

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Thomas Jefferson, *Notes on the State of Virginia*, Query 17 . 7
Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)*, July 1989, *available in* ERIC, File No. ED315469 8
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CONSENT TO FILING

This brief *amici curiae* is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The United States Congress is now considering legislation that would enhance the sentences of criminals who commit hate crimes. The Federal legislation, which is entitled the "Hate Crimes Sentencing Enhancement Act," was originally introduced in the last session of the Congress by Representative Charles E. Schumer in the House, *see* H.R. 4797, 102d Cong., 2d Sess. (1992), and by Senator Paul Simon in the Senate, *see* S. 2522, 102d Cong., 2d Sess. (1992). The proposal, which was approved by voice vote in the House Committee on the Judiciary, passed the House also by voice vote. The bill failed to pass the Senate only because of an objection raised by a single Senator, which was sufficient to block the measure under the rigid parliamentary strictures that were imposed in the final hours of the 102d Congress. The same measure is being reintroduced in the current session of Congress by Representatives Charles E. Schumer and F. James Sensenbrenner, Jr., who serve respectively as the Chairman and the ranking Minority member of the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary.

The Federal legislation would operate by directing the United States Sentencing Commission to adopt guidelines to increase, by not less than three offense levels, the sentence received for a Federal offense that is determined to be a hate crime. "Hate crime" is defined under the bill as "a crime in which the defendant's conduct was motivated by hatred, bias or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." Raising an offense by three severity levels equates to an average sentence enhancement of one-third real time served.

The Congress is seeking to combat a veritable epidemic of hate crime that is sweeping our country. Though certainly not new to our society, instances of violence and destruction of property where victims are targeted on the basis of race or religion or other specified status are occurring with alarming frequency. In 1990, Congress passed the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990), which seeks to measure the true extent of bias-related crime in the United States. The pending legislation is a stronger measure that authorizes more severe punishment under Federal law for such crimes, which can often terrorize whole communities.

Last year, the House Committee on the Judiciary's Subcommittee on Crime and Criminal Justice held two hearings on the proposed legislation, one in Brooklyn, New York, and one in Washington, D.C. The testimony at those hearings strongly demonstrated the urgent need for stiffer penalties against hate crimes, in particular by illustrating the unique harm that attaches to such crimes and their pervasive and destructive impact on our communities. It also established on firm grounds the constitutionality of sentence enhancement provisions imposed on those who commit hate crimes. The extensive testimony that was received in the Subcommittee on the constitutionality of the proposed legislation was presented and discussed *after* the Court's recent decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), which invalidated not a hate *crimes* law, but a hate *speech* ordinance under the First Amendment.

Although the language and potential operation of the proposed Federal law both differ from the Wisconsin penalty enhancement statute at issue in this case, the two measures are similar in purpose. Therefore, the *amici curiae* Members of Congress respectfully wish to present the Court with observations about the constitutionality of sentencing enhancements for perpetrators of hate crimes. These observations are grounded in the *amici curiae*'s findings on the need for and the purpose of proposed hate crimes laws, which have been developed extensively in the congressional hearing process. Based on this background, we urge the Court to recognize both the compelling government

interests at stake in punishing hate crimes and the close nexus between that punishment and the *conduct* that is proscribed under sentencing enhancement laws.

ISSUE PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion, or other specified status?

SUMMARY OF ARGUMENT

1. The Wisconsin statute at issue here, Wis. Stat. § 939.645 (1989-90), is a penalty enhancement device. As such, it applies only to punish *conduct*, not speech. Indeed, the statute does not draw any distinctions based on speech, the content of speech, or the consequences of speech. Instead, it simply enhances the punishment for conduct, already otherwise criminal, when the perpetrator "[i]ntentionally selects" the victim based on specified characteristics.

2. The rationale for such laws is that the criminal conduct is more heinous and reprehensible, and the potential harm is greater, when the perpetrator intentionally targets a victim in this manner. That judgment, which has been reached by an overwhelming majority of state legislatures and is currently being documented in the United States Congress as well, is readily defensible given the pervasive and destructive impact of hate crimes.

3. A sentence enhancement for intentional selection of a crime victim based on specified characteristics does not violate the Constitution. The targeting of a victim, even or perhaps especially when the targeting is based on discriminatory motivation, does not constitute protected speech or thought under the First Amendment. Moreover, this penalty enhancement law operates in exactly the same manner as do the antidiscrimination laws already on the books at the Federal and state levels. Those

laws have been broadly accepted as constitutional throughout this country. If government can punish otherwise lawful acts, such as hiring and firing employees, when those acts are deliberately undertaken based on specified characteristics of individuals, then *a fortiori* the government can enhance the punishment for criminal conduct when that conduct is deliberately undertaken based on the same kinds of specified characteristics.

4. The Court has explicitly recognized that it is permissible to consider racial animus and similar motivations when determining the sentence for crime. Indeed, the Court found this approach to be constitutional even in the highly sensitive context of capital sentencing. No serious argument exists to the contrary under the statute at issue here.

5. That proof of motivation may require the adducement of spoken comments does not differentiate the application of these laws from any trial in which the defendant's statements may be introduced to show both the defendant's state of mind and the actions that occurred. It is no different, in particular, from the trial of alleged violations of the antidiscrimination laws. A determination that the use of such statements -- which include confessions and admissions -- poses constitutional problems would create wholesale disruption of the trial process.

6. This law also is not overbroad. Again, it does not criminalize any expression whatsoever, let alone any amount that would be substantial enough to create an overbreadth problem. In particular, unlike the law at issue in *R.A.V.*, this measure does not make criminal any expressive conduct based on the reactions that may be caused in other individuals. The close nexus between this statute and properly proscribed conduct -- both criminal acts and the intentional selection of a victim based on specified characteristics -- negates any overbreadth challenge.

ARGUMENT

I. THIS PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT PUNISHES CRIMINAL CONDUCT THAT IS PROPERLY PROSCRIBED, AND DOES NOT PUNISH EITHER THE CONTENT OR THE CONSEQUENCES OF SPEECH, AS IS ALSO TRUE OF OTHER ANTIDISCRIMINATION LAWS

1. The Wisconsin statute at issue here is a penalty enhancement device. Punishment is enhanced under the statute when the person who commits a crime "[i]ntentionally selects" the victim because of certain specified characteristics. Wis. Stat. § 939.645(1)(b). Thus, the statute applies only to punish *conduct*: the act of intentionally selecting a victim based on one of the specified grounds. The law does not in any way punish mere speech or association.

The court below thus misapprehended the effect of this law when it stated that "the hate crimes statute punishes bigoted thought." Pet. A8. The statute does not draw any distinctions based on speech or thought. Nor does it enhance punishment based on the content of speech or thought. If an individual is prejudiced against other individuals based on the characteristics specified in the statute, those thoughts are immune from punishment. If the individual articulates those thoughts by some means, including offensive means (which is akin to the expressive conduct that was at issue in *R.A.V.*), that again is mere speech, not reached by the statute. But when the individual moves into action by deliberately selecting and engaging in criminal conduct against a victim based on those specified characteristics, the proper constitutional limits of free expression have been passed. By the act of premeditation, of intentional selection, the individual

has created a legitimate justification for heightened punishment of the ensuing criminal conduct.[1]

There is no question that the intentional selection of a victim, which moves beyond any protected area of belief to constitute a mental act, can be considered a separate factor that warrants more severe punishment under the law. For example, under Federal law the "unlawful killing of a human being" constitutes manslaughter. 18 U.S.C. § 1112. But if the same killing is done "with malice aforethought," the crime is murder and a more severe punishment can be levied. *Id.* § 1111. Proof that the perpetrator intentionally selected the victim and thus premeditated the crime suffices to show the additional element necessary to establish murder. In addition, the intentional selection of a victim is considered to be so significant by itself that it suffices to establish the crime of murder *even if in the end someone else is killed instead*. *Id.*; *see, e.g.*, *United States v. Sanchez*, 741 F. Supp. 215 (S.D. Fla. 1990). The premeditation increases both the intrinsic heinousness and the potential harm of such a crime, and thus warrants the additional punishment. But all of these considerations are a far cry from laws abridging speech or expression, such as a law that imposes "special prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, 112 S. Ct. at 2547.

2. Likewise, the court below erred when it concluded that the "hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." Pet. A7. This law in no way seeks to punish an individual based on the content of speech or thought, such as for harboring personal biases or prejudices. What it punishes,

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[1] To adapt Thomas Jefferson's famous argument, what another *believes* cannot rightly be punished, since it "neither picks my pocket nor breaks my leg." Thomas Jefferson, *Notes on the State of Virginia*, Query 17. But when one actually does intentionally select and then undertake criminal activity against the person or property of another, as is true with any violation of this statute, those acts can be punished consistent with the Constitution.

instead, are acts of crime; the punishment is enhanced when the criminal perpetrator also intentionally selects the victim based on specified characteristics. The rationale for such laws is not that offensive thought must be punished because it is somehow intrinsically dangerous or because of the reaction it may provoke in others. Instead, the documented rationale for hate crimes laws is that the harm is greater, and the criminal conduct more heinous and reprehensible, when the perpetrator intentionally selects a victim in this manner.

It is by now widely recognized that ordinary crimes become far more harmful and pervasive when they are undertaken as hate crimes by intentionally targeting the victim based on specified characteristics. As the committee report on H.R. 4797 concluded: "These crimes are not ordinary crimes of violence and destruction of property. Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities." H.R. Rep. No. 981, 102d Cong., 2d Sess. 3 (1992). There are several reasons why this is so.

First, scientific studies have documented that crimes are more severe, and the harm to the victim is greater, when the motive is racial or ethnic discrimination. *See, e.g.*, Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)*, July 1989, at 17, *available in* ERIC, File No. ED315469 (assaults that are hate crimes require hospitalization of the victim four times more often than do other assaults). The case at hand, for example, involved the severe beating of a youth that left him in a coma for four days with possibly permanent brain damage. The level of violence is often higher because hate crimes tend to be committed by groups of people against a solitary victim, *see id.* at 15, as happened in this case.

Second, hate crimes have a more pervasive impact than is found with ordinary crimes. Motivations such as racial, religious, or ethnic hatred are more likely to result in a pattern of criminal conduct than are crimes directed solely at a particular individual. And because they are targeted against specified groups of people, hate crimes create a very real danger of escalating recriminations

and retaliations throughout the community. As one court has described:

> Assaultive behavior motivated by bigotry is directed not just at the victim but, in a sense, toward the group to which the particular victim belongs. Such confrontations therefore readily -- and commonly do -- escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases.

State v. Beebe, 680 P.2d 11, 13 (Or. App.), *review denied*, 683 P.2d 1372 (Or. 1984).

Third, the incidence of hate crimes is rising. *See* H.R. Rep. No. 981, *supra*, at 3 ("By all indications, the level of violence inspired by bigotry and hate is rising."); *see also* Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, at B5 ("Everybody who collects data reports a steady increase in hate crimes in the last year or two."). The recent effort to document more fully the true statistics on these crimes reveals "an alarming trend of increasing racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country." Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270 (1988) (citing sources). For all of these reasons, the government obviously has an important interest in seeking to impose enhanced penalties on hate crimes.

A legislature therefore can readily determine that the act of intentionally selecting a criminal victim based on certain specified characteristics is more harmful and more deserving of punishment

than the same underlying criminal activity standing alone.[2] It is precisely that judgment which has been reached by an overwhelming majority of state legislatures and is currently being documented in the United States Congress. The proper conclusion is not that the government thereby is seeking to punish "offensive thought," but instead that it has crafted an appropriate and proportional response to the underlying conduct involved in the admittedly pervasive and destructive impact of hate crimes.[3]

This distinction is underscored by a hypothetical that is advanced by the Court in *R.A.V.* There the Court took care to distinguish between "a prohibition of fighting words that are *directed at* certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause)," 112 S. Ct. at 2548 (emphasis added), and "a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred," which the Court found to be facially invalid. *Id.* This comparison illustrates that the Court's real concern in *R.A.V.* was

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[2] In like fashion, a legislature can properly determine that crimes committed against other classes of individuals warrant a stiffer response if there is a reasonable factual basis for that determination. *See, e.g.*, 18 U.S.C. § 2251 (criminal penalties for sexual exploitation of children); *id.* § 1751 (criminal penalties for assassination, kidnaping, or assault of the President or Presidential staff).

[3] Even if the Court thought that this penalty enhancement law somehow mixed "speech" and "non-speech" elements, its constitutionality can also be shown based on *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, where "'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. In that decision, the Court upheld the conviction of a man who burned his draft card in protest of the Vietnam War because the law prohibiting its destruction furthered "an important or substantial governmental interest . . . unrelated to the suppression of free expression." *Id.* at 377. This is even more true of the penalty enhancement statute here, which does not regulate or prohibit any symbolic or expressive conduct. *Cf. United States v. Eichman*, 496 U.S. 310, 313-15 (1990).

the government's attempt to punish *speech* based on *content* by criminalizing those "who express views on disfavored subjects." *Id.* at 2547.[4] But the mere act of intentionally selecting "certain persons or groups" as targets was not judged by the Court to pose any real constitutional problem, even if the victims were only verbally affronted rather than physically assaulted. *Cf. R.A.V.*, 112 S. Ct. at 2565 (Stevens, J., concurring) (government "may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats.").[5]

3. Given the clear validity of a penalty enhancement that is based on intentional selection of the crime victim, the only question is whether such an enhancement somehow becomes constitutionally invalid when it is tied to intentional selection of the victim based on specified characteristics. This argument (which is quite odd in light of the weighty justification for protecting the public against criminals who target their victims on

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[4] *See also R.A.V.*, 112 S. Ct. at 2542 ("the ordinance is facially unconstitutional in that it prohibits otherwise permitted *speech solely on the basis of the subjects the speech addresses*") (emphasis added); *id.* at 2548 ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than *silencing speech on the basis of its content.*") (emphasis added).

[5] The Court's sole caveat in this passage -- that attempts to punish the intentional targeting of "certain persons or groups" must be evaluated under the Equal Protection Clause, 112 S. Ct. at 2548 -- demonstrates again that the Wisconsin penalty enhancement statute is plainly constitutional. The caveat raised by the Court indicates that punishments for the intentional targeting of victims which lack any rational basis (such as a law based on whether the victim is a Republican or a Democrat, or the like) are still vulnerable under other constitutional provisions. But they do not, properly understood, present any serious *free speech* problem. The *amici curiae* would note that no issue is raised in this case under the Equal Protection Clause; the lower courts found that respondent had waived any such claim. Pet. A55. In any event, the rational basis that underlies penalty enhancement laws for hate crimes is evident.

just such bases) must ultimately fail. The intentional targeting of crime victims based on specified characteristics does not attain constitutional protection simply because it stems from bias or prejudice.

On the contrary, the Court recently declared: "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2546-47. This has always been the Court's view. Motivations of racial, religious, or ethnic discrimination have never been afforded affirmative protection under the First Amendment. Indeed, the Court has repeatedly rejected such assertions:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Norwood v. Harrison, 413 U.S. 455, 469-470 (1973); *see also New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). If this is so in the context of nonviolent discrimination when choosing one's own associates, it is so even more powerfully where the same discriminatory motivations spawn criminal actions against person or property. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection").

Indeed, a sentence enhancement for intentional selection of a crime victim based on specified characteristics operates in exactly the same manner as do the legion of Federal and state antidiscrimination statutes -- laws that this Court has expressly upheld as constitutional. *See Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Under those laws, activities that are otherwise wholly lawful, such as hiring and firing employees, become illegal when they are undertaken based on the specified characteristics of individuals. *See, e.g.*, 42 U.S.C. § 2000e-2. It is precisely the discriminatory *motive* that creates the illegality of such activities in cases involving disparate treatment, *see, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."), and which therefore must be proved before individuals can be subjected to punishment under those provisions. Yet it has never even been suggested that these measures may somehow violate the First Amendment.

By the same logic, the government can enhance punishment for criminal conduct when that conduct is deliberately undertaken based on the same kinds of specified characteristics. This point is made forcibly by the dissent below. It simply cannot be, as Justice Bablitch observes, "that the same Constitution which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime." Pet. A27.[6]

Such penalty enhancement schemes are in fact just a more modest form of the Federal laws against genocide. Those laws apply to anyone who targets "a national, ethnic, racial, or religious group" for certain acts of criminal violence "with the specific intent to destroy [that group] in whole or in substantial part." 18 U.S.C. § 1091(a). That statute was enacted to implement the International Convention on the Prevention and Punishment of the Crime of Genocide, which was drafted shortly after World War II, "when the horrors of the Holocaust were exposed and the cruel and inhuman actions of Hitler's Nazi regime were fresh in the minds of the world community." S.

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[6] *Cf.* 18 U.S.C. § 242 (imposing criminal penalties on one who subjects another to "different punishments, pains, or penalties" under color of law because the other is "an alien, or by reason of his color, or race").

Rep. No. 333, 100th Cong., 2d Sess. 2 (1988). The only difference between the Federal law punishing genocide and the penalty enhancement at issue in this case is that the Federal law requires proof also of specific intent to destroy the targeted group -- a difference that does not carry constitutional significance in this instance.

II. THE COURT HAS EXPLICITLY HELD THAT THE CONSTITUTION PERMITS FACTORS SUCH AS RACIAL MOTIVATION TO BE CONSIDERED IN DETERMINING THE APPROPRIATE PUNISHMENT FOR CRIME, EVEN WHERE SPOKEN WORDS MUST SERVE AS PROOF

1. It certainly does not violate the First Amendment for the prosecution of a crime to require inquiry to be made into the defendant's mental processes and thoughts or beliefs. On the contrary, this is a commonplace in the criminal law. And the Court has explicitly said that proof the defendant was motivated by racial hatred, in particular, can be used to increase the punishment for crime. Indeed, the Court has judged this practice to be constitutional even in the more sensitive context of capital sentencing.

In *Barclay v. Florida*, 463 U.S. 939 (1983), a plurality of the Court declared that the "Constitution does not prohibit a trial judge from taking into account the elements of racial hatred" in determining whether the death penalty is appropriate in a murder case. *Id.* at 949. The trial judge had discussed the racial motive for the murder as a partial explanation for his decision to sentence the defendant to death, and had expressly compared this crime to the practices of Nazi concentration camps. The Court found that the defendant's racial motivation could well be relevant in assessing aggravating circumstances that hinged on the defendant's mental state. *Id.* at 948-49.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), the Court observed that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and

associations" in determining the penalty for crime. *Id.* at 1097. The Court stressed that if such evidence is relevant to the commission of a crime, or to the harm done by criminal conduct, then it is properly considered in fixing an appropriate sentence.[7] Thus the Court cited *Barclay* with approval and reaffirmed that "evidence of racial intolerance" could properly be considered in determining the proper sentence for crime, as long as it is relevant to the factual issues raised. *Id.* This would be so, for example, where "elements of racial hatred" are actually "involved in" the commission of the crime. *Id.* at 1098.[8]

2. In addition, the use of spoken comments to prove motivation, as part of the larger process of establishing both the defendant's actions and state of mind, is an ordinary feature of the trial process, which does not in itself raise any First Amendment problem. In *Barclay*, for example, the racial motivation for the crime was shown by the contents of a written note (styled as a "[w]arning to the oppressive state") and of tape-recorded comments. 463 U.S. at 942-44.

Moreover, the use of speech to effect the intentional selection of a victim by a predatory group of criminals, as occurred in this case, does not confer any protection upon the perpetrators under

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[7] In *Dawson* itself, the Court was unable to find any "evidence showing more than mere abstract beliefs on Dawson's part," 112 S. Ct. at 1098, and in particular could find no link between the defendant's mere membership in a racist group and either the crime committed or the harm done by that crime. By contrast, the intentional selection of a criminal victim based on specified characteristics is made directly punishable by the Wisconsin penalty enhancement statute, and the special harms that ensue from such targeting of crime victims are manifest.

[8] In *Dawson*, the Court found no constitutional bar to the admission of "evidence concerning one's beliefs and associations" in determining the penalty for crime, *even where* those beliefs and associations are independently protected by the First Amendment. 112 S. Ct. at 1097. In this case, however, as has been demonstrated already, respondent's discriminatory motivation for intentionally selecting his victim is not independently protected by the First Amendment.

the First Amendment. Instead, it is uniformly understood that an "illegal course of conduct is not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action." *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (rejecting constitutional challenge to the criminal provisions of the Fair Housing Act that apply to willfully injuring, intimidating, or interfering with equal access to housing); *United States v. Redwine*, 715 F.2d 315, 321-22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (affirming conviction under same statute by relying on racial epithets that defendant shouted while engaging in criminal acts to establish a racial motivation for his acts).

In sum, the determination of whether a criminal defendant intentionally targeted the victim based on specified characteristics necessarily involves an examination of the defendant's mental processes in conceiving and committing the crime. And, as the court below noted, speech "may often be used as circumstantial evidence to prove the actor's intentional selection." Pet. A18. But this prospect, in itself, certainly does not render the penalty enhancement statute unconstitutional. On the contrary, the broad application of any such principle would totally undermine the ordinary criminal trial process.

III. THIS PENALTY ENHANCEMENT STATUTE IS NOT OVERBROAD BECAUSE IT DOES NOT INCLUDE WITHIN ITS SWEEP ANY CONSTITUTIONALLY PROTECTED EXPRESSION OR "CHILL" ANY PROTECTED SPEECH

This law also is not overbroad. The overbreadth doctrine, as a basis for invalidating statutes on their face to protect parties not themselves before the court, "is 'strong medicine' that is used 'sparingly and only as a last resort.'" *New York State Club Ass'n*, 487 U.S. at 14, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). A statute must be upheld unless it is "substantially" overbroad, that is, unless there is "a realistic danger that the statute itself will significantly compromise recognized First

Amendment protections of parties not before the Court." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). No such parties can be identified here.

The court below found overbreadth problems because it thought the penalty enhancement statute would chill speech relating to the specified characteristics. Pet. A18-19. Indeed, it apparently judged that this problem extended not only to an actual defendant accused of breaking this law, but also to potential defendants and even the entire populace. *Id.*

But this analysis misapplies the overbreadth doctrine, which applies only to prohibitions on *speech* or *expression*. The overbreadth doctrine does not immunize speech from being used as "circumstantial evidence," *id.* at A18, of a defendant's state of mind. It would be equally as incorrect to contend that the Federal laws against treason, *see* U.S. Const., art. III, § 3; 18 U.S.C. § 2381, are unconstitutionally overbroad because the not incidental consequence of such laws may be to chill speech among the populace that is critical of the government.

In particular, the use of speech as circumstantial evidence that an intentional selection has been made based on specified characteristics occurs routinely in trials under the antidiscrimination laws. Yet such laws certainly have a far more pervasive impact on free expression among the American public than will ever flow from penalty enhancement statutes.

Justice White's concurrence in *R.A.V.* sets forth the correct application of the overbreadth doctrine as applied to the St. Paul "hate speech" ordinance. That ordinance, as definitively construed by the Minnesota Supreme Court, made criminal "expressive conduct that causes only hurt feelings, offense, or resentment." 112 S. Ct. at 2560 (White, J., concurring). Such speech lies at the heart of the First Amendment, and cannot be prohibited simply because of the kind of general emotive reaction it may cause in others. *Id.* at 2559-60; *cf. City of Houston v. Hill*, 482 U.S. 451, 460 (1987) (holding ordinance that barred the verbal interruption of a police officer to be overbroad where "the

enforceable portion of the ordinance deals not with core criminal conduct, but with speech").

Here, by contrast, the intentional selection of a victim based on specified characteristics is tied by a tight nexus to the commission of criminal actions. Both are properly proscribed conduct, and as Justice White noted, "expression may be limited when it merges into conduct," *id.* at 2560 n.13.[9] This is, in fact, nothing more than classic overbreadth doctrine, the function of which "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct," especially "harmful, constitutionally unprotected conduct" that is controlled by the criminal law. *Broadrick*, 413 U.S. at 615; *see also New York v. Ferber*, 458 U.S. 747, 770 (1982). But no speech or expressive conduct is itself made criminal under Wisconsin's penalty enhancement statute. In addition, the discriminatory motivation for criminal conduct that is covered by this law is not itself protected by the First Amendment. The penalty enhancement statute thus is not overbroad.

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[9] The same distinction between laws punishing speech or expression and laws punishing conduct was drawn in an overbreadth context in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). There the court struck down as overbroad a university policy that banned "stigmatizing or victimizing" an individual on the basis of race and other characteristics, since the policy could be directly applied not only to prohibit conduct, but also to prohibit constitutionally protected speech if the speech were judged to be unseemly or offensive to others. *Id.* at 864-66. Yet the court approvingly noted that "[c]redible threats of violence or property damage made with the specific intent to harass or intimidate the victim because of his race, sex, religion, or national origin is [sic] punishable both criminally and civilly under Michigan law." *Id.* at 862. And the penalty enhancement statute at issue here, of course, does not involve not mere threats, but criminal actions themselves.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the decision of the Wisconsin Supreme Court.

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January 28, 1993

FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

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v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE CROWN HEIGHTS COALITION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH COMMITTEE

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United States v. Mills,
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18 Stat. 336 (1875) 7

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Cong. Globe, 39th Cong., 1st sess. 2962 (1866) 18

FBI Law Enforcement Bulletin, (January 1991.) 40

"Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes", 101 *Col. L.Rev.* 178 (1992) 31

K. Stern, *Bigotry on Campus: A Planned Response* (1990) 44

Minnesota Board of Peace Officer Standards and Training, *Bias Motivated Crimes* (1990) .. 43

National Institute Against Prejudice and Violence, *Ethnoviolence on Campus: The UMBC Study*, (1987) 44

Note, 26 *Marquette L.Rev.* 92, (1942) 23

T. Wood, *An Institute of the Laws of England*, (1772) . 23

1 W. Hawkins, *A Treatise of the Pleas of the Crown*, (1716) 23

W. LaFave and A. Scott, Jr., *Criminal Law* (1972) 23, 30

W. LaFave, *Principles of Criminal Law* (1978) 22

No. 92-515

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE CROWN HEIGHTS COALITION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH COMMITTEE

INTEREST OF AMICI[1]

The Crown Heights Coalition was formed on August 22, 1991, at the behest of Brooklyn Borough President Howard Golden, in response to a racial crisis in the Crown Heights neighborhood of Brooklyn, in which African-Americans, Caribbean-Americans, and Lubavitch Hasidic Jews live. This racial crisis was precipitated by the tragic automobile accident in which Gavin Cato, a seven year old black boy, was killed by a car driven by a Lubavitch, and the apparently retaliatory murder of Yankel Rosenbaum, a twenty-nine year old Lubavitch scholar, by a group of black youths. The Crown Heights Coalition includes thirty-six educational, religious, civic and elected leaders representing local Lubavitch Hasidim, Caribbean-Americans, and African-Americans. Dr. Edison O. Jackson, President of Medgar Evers College, and Rabbi Shea Hecht, Board Chairperson, National Committee for the Furtherance of Jewish

[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

Education, serve as Co-Chairpersons. The Coalition has identified and is endeavoring to alleviate the underlying causes of racial and ethnic tensions in Crown Heights, including a lack of cultural awareness and interaction, problems in police-community relations, inadequate youth services, and concerns that one group or another has received preferential treatment by city officials. The members of the Coalition share a conviction that a respect for and tolerance of racial, religious and cultural differences is essential to the well being of their community.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African-Americans to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented plaintiffs seeking to enforce a wide variety of statutes which prohibit intentional discrimination on the basis of race. The constitutionality of these statutes has been called into question by the decision below. Individuals represented by the Fund's attorneys have been the victims of

intentionally discriminatory conduct which violated criminal civil rights provisions similar to the statute declared unconstitutional by the Wisconsin Supreme Court.

The American Jewish Committee, a national organization with over thirty chapters, was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is AJC's conviction that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and constitutional rights of all Americans, irrespective of race, creed, or national origin. The constitutionality of criminal statutes such as the Wisconsin law at issue in this case is of particular concern to AJC because Jews and Jewish religious institutions have been and continue to be a particular target of bias motivated criminal activity.

SUMMARY OF ARGUMENT

Unlike the statute held unconstitutional in *R.A.V. v. St. Paul*, 120 L.Ed.2d 305 (1992), the statute at issue in this case is concerned with conduct, not expression. Section

939.645 authorizes an enhanced sentence where the victim of a crime was selected on the basis of race, etc., regardless of whether the perpetrator, by word or expressive conduct, conveyed any message to the victim or the public. This Court has long held that neither violence nor intentional discrimination are protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Bob Jones University v. United States*, 461 U.S. 574 (1983). The imposition of an enhanced sentence for a racially motivated crime was expressly held permissible in *Barclay v. Florida*, 463 U.S. 939 (1983).

If the First Amendment barred the imposition of additional criminal sanctions, or penalty enhancement, based on a defendant's motive, numerous federal and state laws would have to be struck down as unconstitutional. Six federal criminal provisions apply to conduct undertaken with a racial motive. Eight federal laws impose criminal penalties for attacks on various federal officials "on account of" their performance of official duties. Wisconsin law imposes an

enhanced penalty for an assault on a juror "by reason of any verdict . . . assented to by the person." (Wisconsin Stat. 940.20). These statutes are indistinguishable from the Wisconsin law held invalid by the court below.

Section 939.645 serves the state's vital interest in deterring and punishing bias related crimes. Such crimes have a unique capacity to terrorize entire groups, to interfere with constitutionally protected activity, and to trigger retaliatory criminal acts.

The existing decisions of this Court provide suitable safeguards to assure that section 939.645 is not abused. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Dawson v. Delaware*, 117 L.Ed.2d 309 (1992).

ARGUMENT

Since the end of the Civil War, when the Constitution was amended to replace protection of chattel slavery with a guarantee of equal justice, the national government has utilized the force of the criminal law to prohibit, deter and punish various forms of invidious discrimination. The 1866

Civil Rights Act contained in section 2 a criminal provision forbidding certain types of unequal treatment "by reason or . . . color or race."[2] The 1870 Civil Rights Act, adopted following the ratification of the Fifteenth Amendment, imposed criminal penalties on those who denied citizens an equal right to vote "without distinction of race, color, or previous condition of servitude."[3] In 1875 Congress declared it a misdemeanor for any person responsible for the selection or summoning of jurors to discriminate "on account of race, color or previous condition of servitude."[4] Today there are a total of six federal criminal provisions that prohibit conduct based on an invidiously discriminatory motive. Most of these, like the 1866 Civil Rights Act, apply to discrimination on the basis of race; other subsequently

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[2] 14 Stat. 27 (1866). This provision is now codified in 18 U.S.C. §241.

[3] 16 Stat. 140 (1870). The analogous provisions are now codified in 18 U.S.C. §245.

[4] 18 Stat. 336 (1875). This Court sustained the prosecution of a state judge under this statute. *Ex Parte Commonwealth of Virginia*, 100 U.S. 339 (1880).

enacted prohibitions also apply to discrimination on the basis of national origin, religion, and sex.[5]

Wisconsin, like several dozen other states, has adopted a criminal provision similar to these federal criminal civil rights provisions. The question presented by this case is whether the First Amendment prohibits the states and the federal government from enacting criminal prohibitions against invidious discrimination.

I. SECTION 939.645 DOES NOT VIOLATE THE FIRST AMENDMENT.

Section 939.645 provides that the penalty for most[6] crimes may be increased if the prosecution proves beyond a reasonable doubt that the defendant selected the victim of the crime, or the property damaged or affected by the crime, "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the

[5] 18 U.S.C. §§242, 243, 245, 246, 247; 42 U.S.C. §3631.

[6] The enhanced penalty in section 939.645 applies to the crimes prohibited by chapters 939-948 of the Wisconsin Statutes. These chapters encompass most of the criminal provisions of the Wisconsin statutes.

owner or occupant of that property." What the actual sentence imposed will be remains a decision for the sentencing judge. In order to trigger application of section 939.645, the prosecution must prove beyond a reasonable doubt two distinct elements: first, that the defendant made a deliberate choice of victim, rather than, for example, robbing whomever he chanced first to meet, and, second, that the choice was made on the basis of race or one of the other specified grounds.

On the face of the statute, however, it is irrelevant *why* the perpetrator may have utilized race, etc., to select his victim. The statute does not require proof that the defendant harbored animosity toward a particular group,[7] and does not authorize an enhanced penalty merely because the defendant may believe that his own race, religion or ethnic group is superior. Section 939.645 would apply, for

[7] Some penalty enhancement statutes do require proof of racial or other class animus. In our view such a requirement poses no constitutional problem. See *Bray v. Alexandria Women's Health Clinic*, 61 U.S.L.W. 4080 (1993).

example, if a black perpetrator selected a black victim in the belief that the police were less likely to investigate crimes against racial minorities. The law would be equally applicable to a defendant who, although personally indifferent to matters of theology, made a tactical decision to rob Quakers in the belief that they were less likely to offer forcible resistance. Of course in any particular case it may be that a defendant made a race-based choice of victim, not as a matter of tactics, but because of some belief regarding, for example, the moral worth of the targeted group. But the Wisconsin law does not require that the defendant adhere to any such view, and such views, if not the basis for the selection of the victim, would be legally irrelevant.

The First Amendment, of course, protects the rights of all persons, law abiding and criminal alike, to hold whatever beliefs they please regarding race, religion, ancestry, disability, and sexual orientation. But where an individual's beliefs lead him or her to engage in otherwise

criminal activity, the First Amendment affords no protection for that conduct. In striking down the state flag desecration statute in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court emphasized that

> nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate. We also emphasize that Johnson was prosecuted *only* for flag desecration--not for trespass, disorderly conduct, or arson.

491 U.S. at 412 n. 12. Justice Stevens correctly observed in *United States v. Eichman*, 496 U.S. 310, 322 (1990) (dissenting opinion), that "the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment . . ." The Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), admonished:

> The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'". . . [V]iolent conduct is beyond the pale of constitutional protection.

458 U.S. at 916, 933. Even speech can be criminalized where it is an effective "incitement to imminent lawless action."

Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). *A fortiori* lawless action itself enjoys no constitutional protection merely because it may have been prompted by such verbal incitement. The First Amendment provides to every individual the right to believe Proudhon's quip that "Property is theft", but accords to no one the right to steal.

Brandenburg applied the First Amendment to protect the right of members of the Ku Klux Klan to both adhere to and express deplorably racist and anti-Semitic *beliefs*. 395 U.S. at 446, 447, 446 n. 1. But this Court has repeatedly rejected First Amendment challenges to the authority of the government to forbid discriminatory *conduct*.

> [A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent--wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); *see Board of Directors v. Rotary Int'l*, 481 U.S. 537 (1987).

> [P]arents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . [b]ut it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.

Runyon v. McCrary, 427 U.S. 160, 176 (1976); see *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) ("although the Constitution does not proscribe private bias, it places no value on discrimination. . . .").

The ordinance held unconstitutional in *R.A.V. v. St. Paul*, 120 L. Ed. 2d 305 (1992), is clearly distinguishable from the statute in the instant case. The law in *R.A.V.* was concerned with speech, not with action; it forbad the use of symbols, graffiti, or appellations (e.g. racial epithets) which would arouse "anger, alarm or resentment in others on the basis of race," etc. 120 L.Ed. 2d at 315. This Court held that even where speech as such was subject to government control because, e.g., it involved fighting words, libel or obscenity, those controls had to be content neutral; the St.

Paul ordinance, although directed at fighting words, was fatally defective because it specifically treated some fighting words differently than others. 120 L. Ed. 2d at 323-26.

The statute at issue in this case, on the other hand, is directed not at expression, whether through words or symbolic acts, but at conduct, regardless of whether that conduct has any expressive element[8] and regardless of what any such expressive element may be. Thus, section 939.645 is fully applicable if the victim at issue was chosen on the basis of race, etc., even though the perpetrator may never have intended to communicate any message to his victim or others. In the instant case there appears to have been no such intent or message; the victim in all likelihood assumed at the time of the crime that he was being assaulted for his shoes. Conversely, under the Wisconsin law even the most overtly racist message conveyed in connection with a crime would be irrelevant unless the victim was selected by means

[8] "One could violate this statute while remaining entirely mute." *People v. Grupe*, 532 N.Y.S. 2d 815, 818, 141 Misc. 2d 6 (N.Y. Crim. Ct. 1988).

of one of the forbidden criterion. Thus if a perpetrator had killed a randomly selected victim, and then pinned to the body a diatribe vilifying some racial group, the Wisconsin statute would not apply.

R.A.V. does not, as the court below evidently believed,[9] impart some special constitutional protection to a defendant's "racial or other discriminatory animus". On the contrary, *R.A.V.* made clear that under other statutes a state could have penalized the very cross burning in that case. The Court observed that Minnesota had available to it for that purpose several laws which were neutral with regard to any message that R.A.V. may have intended to convey. 120 L. Ed. 2d at 328. The majority referred expressly to two Minnesota provisions which, like the statute in the instant case, provided for enhanced penalties where certain crimes were committed "because of the victim's . . .

[9] Pet. App. A16.

race, color, religion, sex, sexual orientation, disability . . . age, or national origin."[10]

The Court in *R.A.V.* specifically held that the enforcement of anti-discrimination laws would raise no problems under the First Amendment, even where--as is not, of course, the case here--the discrimination had been effectuated by means of words rather that physical actions.

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . Thus, for example, sexually

[10] 120 L. Ed. 2d at 315 nn. 1 and 2. Minnesota Statutes § 606.595(Supp. 1992), cited at p. 315 and footnote 1 as among the laws under which R.A.V. might have been punished, authorizes an enhanced sentence for intentional damage to property if the perpetrator caused the damage because of the race, etc., of the owner or another.

Footnote 2 notes that the petitioner in *R.A.V.* had indeed been charged under, but "did not challenge", Minnesota Statute §609.2231(4). The cited subparagraph 4 is the portion of the Minnesota assault statute which authorizes an enhanced penalty for "[w]hoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . ,age, or national origin."

> derogatory "fighting words", among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. . . . . 29 CFR §1604.11 (1991).

120 L. Ed. 2d at 322. The Title VII regulation cited by the Court in *R.A.V.* proscribes as sexual harassment verbal or physical acts which have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11(a) (1991). See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-67 (1986).

R.A.V. also properly recognized that a statute which protected only "certain persons or groups" would ordinarily have difficulty meeting "the requirements of the Equal Protection Clause." 120 L. Ed. 2d at 323. One of the core requirements of the Equal Protection Clause is that all persons should enjoy to an equal degree the protection which the law provides against murder, assault, and other criminal acts. As one member of the Thirty-Ninth Congress explained, "All the people, or all the members of a state or

community, are equally entitled to protection."[11] That concept of equal protection was of central importance to the framers of the Fourteenth Amendment, and explains the use of the word "protection" in the phrase equal protection.[12] The Wisconsin statute at issue in this case, however, does not provide for an enhanced penalty if members of some favored race, religion or other group or class are the victims of crime.[13] Individuals of every race, creed, national origin

[11] Cong. Globe, 39th Cong., 1st sess. 2962 (1866). Senator Wilson admonished:

> "[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land. . . . [T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land . . . . [T]he poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor . . . ."

Id. at 343.

[12] The original intent of the framers of the Fourteenth Amendment in this regard is set out in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., in No. 88-305, *South Carolina v. Gathers*.

[13] In contrast, a state could provide special protection, including a provision for enhanced punishment, for individuals performing governmental or other important functions, or for individuals, such as children, who are particularly vulnerable to attack. A list of such statutes is set forth in Appendix A of the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., in No. 88-305, *South Carolina v. Gathers*.

and sexual orientation are protected to an equal degree by the law.

This Court's decision in *Dawson v. Delaware*, 117 L. Ed. 2d 309 (1992), is fairly dispositive of the validity of the Wisconsin statute at issue in the instant case. The defendant in *Dawson* advanced essentially the same argument accepted by the court below, that "the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." 117 L. Ed. 2d at 318. This Court expressly rejected any such "per se" rule. 117 L. Ed. 2d at 316-17. The Court held that admission of the evidence at issue in *Dawson* was constitutional error because the particular past associations and beliefs of the defendant there "had no relevance to" the crime at issue, and were apparently adduced "simply because the jury would find those beliefs

reprehensible." 117 L. Ed. 2d at 317-18. But the Court added that such evidence could indeed be considered, and provide the basis for a heavier sentence, where the beliefs at issue were the motive for the underlying crime.

> We have previously upheld the consideration, in a capital sentencing proceeding, of evidence of racial intolerance . . . where such evidence was relevant to the issues involved. In *Barclay v. Florida*, 463 U.S. 939 . . . (1983), for example, we held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." . . . In *Barclay* . . . the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. . . . We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder."

117 L. Ed. 2d at 316-18; *see Barclay v. Florida*, 463 U.S. 939,949 (1983) (plurality opinion) ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.").

Wisconsin law makes precisely the distinction mandated by *Dawson*. Section 939.645 does not permit the

imposition of an enhanced sentence merely because a defendant adhered to racist or intolerant beliefs; had his case arisen in Wisconsin, David Dawson's membership in the Aryan Brotherhood would have been irrelevant under section 939.645, and could not have led to the application of that statute. Wisconsin sanctions admission of evidence regarding a defendant's beliefs only where, as was the case in *Barclay*, those beliefs were demonstrably a factor in the commission of the crime at issue.

II. THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH BASIC PRINCIPLES OF CRIMINAL LAW

The interpretation of the First Amendment advanced by the Wisconsin Supreme Court represents an extraordinary and unwarranted departure from the established principles of constitutional and criminal law. The central premise of the decision below is that the First Amendment precludes the states or national government from considering the mental state of a person who committed a forbidden act.

> The statute punishes the "because of" aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection. . . . The physical assault . . . is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's . . . motivation . . . , his thought which impelled him to act, is the reason his punishment was enhanced. . . . Punishment of one's thought, however repugnant the thought, is unconstitutional.

(Pet. App. A9-A15) (Emphasis in original).

This proposed constitutional analysis is at odds with basic principles of criminal law that were universally accepted at the time when the First Amendment was adopted. Since at least 1600 it has been a fundamental precept of Anglo-American law that *actus not facit reum nisi mens sit rea*, an act does not make one guilty unless his mind is guilty. W. LaFave, *Principles of Criminal Law* 60 (1978). This requirement was welcomed as a modification of medieval law, which at times imposed a species of strict

liability in criminal law.[14] Thus eighteenth century authorities were in agreement that no crime was committed unless the perpetrator had acted with "an evil intention." 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, 65 (1716); T. Wood, *An Institute of the Laws of England*, 340 (1772). It is inconceivable that the framers of the First Amendment intended to overturn one of the most important principles of common law jurisprudence.

To this day proof of some mental element is required for virtually all criminal offenses. A number of statutes which lacked such a mens rea requirement have been struck down as unconstitutional.[15] In *Screws v. United States*, 325 U.S. 91 (1945), this Court sustained the criminal provision of the 1866 Civil Rights Act from constitutional

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[14] The evolution of this principle is discussed in F. Pollock and F. Maitland, *The History of English Law*, v. ii, ch. viii, §2 (Milsom, ed., 1968). Pollock and Maitland trace this doctrine to St. Augustine. *Id.* at 476. Other authorities contend the mens rea requirement had its roots in Roman law. Note, 26 *Marquette L.Rev.* 92, 92 (1942).

[15] *See* W. LaFave and A. Scott, Jr., *Criminal Law*, 144-46 (1972); *Lambert v. California*, 355 U.S. 225 (1957); *Robinson v. California*, 370 U.S. 660 (1962).

attack by reading into that section a requirement that the prosecution prove the defendant had acted with an "evil motive" or "bad purpose", such as "purposeful discrimination." 325 U.S. at 101, 103. It is inconceivable that such a mens rea requirement, at least ordinarily necessitated by the Due Process Clause, is paradoxically forbidden by the First Amendment.

The interpretation of the First Amendment endorsed by the court below would, if accepted by this Court, wreak havoc with the criminal provision of the United States Code. That interpretation would, of course, compel the conclusion that all six federal laws criminalizing particularly serious forms of invidious discrimination are unconstitutional. Section 3631 of 42 U.S.C. imposes criminal penalties on any person, "whether or not acting under color of law", who uses force or threats of force against any other person, "because of his race color, religion, sex or national origin" in

connection with the sale or leasing of real property.[16] Section 245(b)(2) of 18 U.S.C. imposes similar penalties on any one, "whether or not acting under color of law," who by force or threats of force interferes with certain federally protected activities "because of" the victim's "race, color, religion or national origin." 18 U.S.C. §247(a)(2) prohibits destruction of or damage to religious property "because of the religious character of that property." Criminal penalties are imposed by 18 U.S.C. §246 on anyone who denies benefits under certain federally funded programs "on account of political affiliation, race, color, sex, religion, or national origin." Section 242 of 18 U.S.C., which forbids imposing unequal punishments "by reason of . . . color, or race", is limited to conduct occurring "under color of law"; in *United States v. Price*, 383 U.S. 787 (1966), this Court held that under some circumstances private parties may be

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[16] The lower courts have consistently rejected First Amendment challenges to section 3161. *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987); *United States v. Lee*, 935 F. 2d 952 (8th Cir. 1991); *United States v. Palmer*, Crim. No. 91-50063-03 (W.D.La), Memorandum Ruling, Oct. 30, 1992.

prosecuted under section 242. Of the federal criminal civil rights statutes, only 18 U.S.C. §243, prohibiting racial discrimination in jury selection, is expressly limited to conduct by government officials.

Equally clearly, the interpretation of the First Amendment adopted by the court below would invalidate all eight federal statutes which prohibit acts of violence against federal judges, jurors, witnesses, marshals, and other officials where those acts were taken "on account of" the performance of official duties.[17] Also invalid would be provisions of Title 18 declaring it a crime to give something of value to an official "because of any official act" (18 U.S.C. §201(c)), or to file false claims "with a view to securing payment" (18 U.S.C. §550), declaring an accessory after the fact any person who aids an offender "in order to hinder . .

[17] 18 U.S.C. §§111(a)(2)(persons designated in section 1114), 115(a) (judge, law enforcement officer, or others designated in section 1114), 372 (any person holding any office under the United States), 1114 (judge, United States Attorney, United States marshal, employee of the F.B.I., or other listed officials), 1201(persons designated in section 1114), 1503 (grand or petit juror), 1513 (witness), 2231 (person executing search warrant.)

. apprehension" (18 U.S.C. §3), forbidding discrimination in public accommodations against members of the armed forces "because of th[eir] uniform" (18 U.S.C. §244), and conspiracies and the use of force against any person "because of his having exercised" federally protected rights (18 U.S.C. §§ 241, 245.) Another thirty federal laws provide that a variety of acts are unlawful if, but only if, engaged in for a particular "purpose" specified in the statute.[18] Still other provisions of Title 18 include a requirement of "intent" which refers, not to what the perpetrator himself did, but to the reason the perpetrator took that course of action.[19]

The decision below would have a dramatic impact as well on state criminal laws. Of course, any criminal law prohibiting invidious discrimination would be

[18] 18 U.S.C. §§47, 288, 494, 495, 500, 505, 551, 594, 595, 598, 599, 605, 608, 706, 707, 793, 796, 842, 877, 917, 1007, 1010, 1014, 1231, 1342, 1384, 1582, 1721, 1857, 1951.

[19] *See, e.g.* 18 U.S.C. §§33, 215, 549, 953, 1507.

unconstitutional.[20] Also invalid would be state laws providing enhanced penalties where the victim of an assault was selected because he or she had engaged in some governmental activity. Wisconsin has three such statutes. Section 940.20, for example, classifies as a Class D felony a battery committed against a witness or juror "by reason of the person having attended or testified as a witness or by reason of any verdict or indictment assented to by the person." The same battery against the same victim would be classified differently in the absence of such a motive. Unlike the statute at issue in the instant case, which merely authorizes an increased penalty, section 940.20 goes further and classifies as a serious felony conduct which might otherwise be a misdemeanor. (See Wis. Stat. §940.19).[21]

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[20] Wisconsin Statutes §942.04, for example, declares it a misdemeanor to discriminate on the basis of race, color, creed, national origin or disability in various public accommodations, or in automobile insurance rates.

[21] Section 943.01 classifies as a Class D felony criminal damage to property of a witness or juror "by reason of the owner's having attended or testified as a witness or by reason of any verdict or indictment assented to by him"; under other circumstances criminal damage to property may be a misdemeanor. Section 943.015 classifies as a Class D felony criminal damage to the property of a revenue official or his or her family "in response to any action taken in an official capacity" by that official.

As amicus Cook County correctly observed in its brief in support of certiorari, the decision below calls into question the constitutionality of almost all state criminal statutes.

> Virtually the entire Illinois criminal code, as in other jurisdictions, relies on proof of intent (indeed, this element of proof operates for the protection of those who commit acts without *mens rea*.) With specific intent crimes, the State must prove that an individual does an act with a further object. Under each of these statutes, the State must prove beyond a reasonable doubt the thought process of the offender . . . .[22]

Under Wisconsin law, for example, a defendant can be shown to have acted intentionally if the state proves he or she acted with "a purpose to do the thing." (Wis. Stat. § 939.23(3)). Conversely, a defendant must be exonerated under certain circumstances if he or she can show that he or she acted "for the purpose of preventing or terminating"

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[22] Brief Amicus Curiae Cook County, Illinois, in Support of Petitioners, pp.10-11 (emphasis in original; footnote omitted.)

unlawful interference with his or her person or property. (Wis. Stat. §§ 939.48, 939.49) In Wisconsin, as in every other state, there are numerous criminal provisions which, like the provisions of Title 18 noted above, require proof that a defendant acted with a particular purpose. See, e.g., Wis. Stat. §943.10 (burglary requires proof of both unlawful entry and a purpose of stealing or committing a felony).

The decision below is also inconsistent with widely utilized sentencing practices and statutes. Until now the motive which prompted a defendant to commit a crime was regarded as an important consideration in determining his or her sentence. W. LaFave and A. Scott, Jr., *Criminal Law* 208 (1972). Thus it was hitherto thought sensible to impose a greater sentence for a burglary if the crime was committed to acquire funds to finance a bank robbery. Numerous capital punishment laws list among the statutory aggravating factors a motive deemed particularly heinous, such as murders committed to avoid arrest,[23] to prevent

[23] See, e.g., *Stringer v. Black*, 117 L.Ed. 2d 367,375 (1992).

testimony,[24] or for pecuniary gain.[25] Under the latter type of statute, where two murderers committed identical acts, and both subsequently filed claims for the life insurance of their victims, they might receive different sentences if one murderer merely knew that he would receive the insurance payment while the other was actually motivated by that fact.[26]

Of course a defendant in any criminal case might seek to win a reduced sentence by proving that he had acted out of a sympathetic motive, such as a desire to feed his children. But if, as the court below suggests, the First Amendment bars enhancement of a sentence because of a heinous motive, it must also bar reduction of a sentence on the basis of a more benign motives. A statutory scheme

[24] See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 310 n. 1 (Brennan, J., dissenting) (1990).

[25] See, e.g., *Lewis v. Jeffers*, 111 L.Ed. 2d 606,615 n. 1 (1990).

[26] Note, "Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes", 101 *Col. L.Rev.* 178, 192-93 (1992), *citing State v. Madsen*, 609 P.2d 1046, 1053 (Ariz. 1980), *cert. denied*, 449 U.S. 873 (1980).

which reduced sentences upon proof of a benign motive would be difficult to distinguish in practice from a scheme which increased sentences for non-benign motives. Under either system a criminal who stole for a noxious purpose would receive a heavier sentence than one who stole for more understandable though still illegal reasons. Under a statute authorizing lenity for benign motives, the prosecution would be entitled to seek to rebut a claim of benign motive by showing, for example, that the defendant in fact acted out of racial animus. Cf. *Payne v. Tennessee*, 115 L. Ed. 2d 720 (1991). The First Amendment argument advanced by the defendant in the instant case could severely limit the ability of defendants to adduce mitigating evidence in other instances.[27]

[27] The First Amendment cannot preclude a state from considering such mitigating evidence, because in capital cases, at least, the states are required to consider *all* mitigating circumstances. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

Apparently recognizing the tension between its reasoning and longstanding sentencing practices, the court below added:

> Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime. (Pet. App. A17 n. 17)

This purported distinction undermines the lower court's entire analysis. If a sentencing *judge* could impose a heavier sentence on a defendant who acted with a racial motive, it is difficult to see the constitutional defect in a *statute* which merely authorized that very practice.

If the decision below is correct, it is difficult to see how this Court could uphold the constitutionality of Title VII or any other federal, state or local civil rights law. Title VII, like 42 U.S.C. §1981, prohibits invidiously motivated discriminatory employment practices, and compensatory and punitive damages are available under Title VII *only* for acts of intentional discrimination. 42 U.S.C. §1981a (1992 Supp.)

The court below suggested that Title VII is distinguishable from the statute at issue in this case, asserting that Title VII prohibits a "discriminatory act", while section 939.645 assertedly punishes not "an act" but "a mental process." (Pet. App. A20). Under Section 939.645, it asserted,

> [t]he actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act.

(Pet. App. A20) This pivotal passage in the decision below is virtually unintelligible. Selection decisions by an employer are not different from selection decisions by a mugger. In the case of a Title VII violation, an employer, having decided that its employment needs require the hiring, promotion, demotion or dismissal of an employee, selects on the basis of race or another forbidden criterion the employee to be so treated. If a Wisconsin employer launched a campaign of racial harassment that included

physical beatings, those beatings would violate both Title VII and section 393.645. It is difficult to see how under such circumstances the application of Title VII could be valid if the application of section 393.645 to the same act for the same reasons would violate the First Amendment.

The decision below suggests that Title VII might be saved from invalidity if its proposed constitutional analysis were limited to criminal statutes. The introduction of a generally lower level of First Amendment scrutiny in non-criminal cases, however, would be a largely unprecedented and dangerously far reaching change. The seminal decision in *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964), turned on the application to civil libel claims of principles that had been first established in a criminal law context. Unquestionably the $1.25 million damage award overturned in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which would have literally destroyed the NAACP, was substantially more serious than the five day jail term upheld in *Walker v. Birmingham*, 388 U.S. 307 (1967). A more

stringent level of scrutiny for sentencing statutes would as a practical matter mean that the small number of individuals who commit serious criminal acts would enjoy more constitutional protection than the far larger group of law abiding citizens.

The notion that the First Amendment precludes consideration of whether a person acted with a discriminatory motive is refuted by the very language of the Constitution itself. The Fifteenth Amendment prohibits denial of the right to vote "on account of race," and the Nineteenth Amendment forbids denial of the franchise "on account of sex." A court asked to enforce either of these constitutional provisions, in the absence of a facially discriminatory law or practice, would have to inquire into the motives of the officials at issue. Indeed, the free speech guarantee of the First Amendment itself requires at times that the courts inquire whether a disputed official action was motivated by a desire to suppress speech. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1988). It would be

paradoxical if the First Amendment prohibited a court from inquiring into, or providing a remedy for, a violation of the First Amendment itself. Equally importantly, the Fourteenth Amendment precludes government officials from making selection or other decisions on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976). If the prosecutor in this case had invoked section 939.645 because of hostility to black defendants, or out of special solicitude for white victims, such an application of that section would have violated the Fourteenth Amendment. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Apparently acknowledging that the criminal law can consider the intent of a defendant, the court below asserts that section 393.645 is invalid because it deals not with intent but with motive. For this genuinely revolutionary change in First Amendment and criminal jurisprudence, the court below relied primarily on an entry in *Black's Law Dictionary*, insisting that the distinction between intent and motive is "crucial." (Pet. App. A11 n. 11). The First

Amendment, however, was not adopted to codify the views of the editors of this or any other dictionary.[28] Other authorities maintain that motive is often an essential element of a crime,[29] that the distinction between intent and motive is purely semantic,[30] and that intent includes any motive which the legislature has required the prosecution to prove.[31] This Court's decision in *Screws v. United States*, 325 U.S. 91 (1945), used the terms motive and intent interchangeably. The more recent and at times arcane academic debate about the meaning of and relationship between intent and motive cannot provide a basis for any constitutional distinction.

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[28] The distinction between motive and intent in *Black's Law Dictionary* is not made, for example, in B. Garner, *A Dictionary of Modern Legal Usage* (1987).

[29] Hitchler, "Motive As An Essential Element of Crime," 35 *Dick.L.Rev.* 105 (1931).

[30] W. LaFave and A. Scott, Jr., *Criminal Law* 204 (1972).

[31] Note, "Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes," 101 *Col. L.Rev.* 178, 190 (1993); see also W. Cook, "Act, Intention and Motive in the Criminal Law," 26 *Yale L.J.* 645, 661 (1917) ("*motive* is merely a name for a certain kind of desire and intention").

III. SECTION 939.645 SERVES IMPORTANT STATE INTERESTS

This Court has repeatedly recognized that there is a vital governmental interest in preventing acts of discrimination.

> [T]he State's strong historical commitment to eliminating discrimination . . . plainly serves compelling state interests of the highest order. . . . .[D]iscrimination . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts v. United States Jaycees, 468 U.S. 609, 624-25 (1984). *R.A.V. v. St. Paul* recognized that the states have a compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination." 120 L. Ed. 2d at 325. We set out in Appendix A the most recent FBI report on bias related crimes.

The states have a particularly important interest in preventing criminal conduct targeted on the basis of, or inflicted because of, a victim's race, religion, or other group characteristic. Bias related crimes inflict on the victim an

injury wholly different in kind from the physical or financial harm caused by ordinary criminal conduct. Such crimes are an attack on the right of the victim to participate equally, if at all, in American society, and can inflict serious and long lasting injury to the dignity of the victim.[32] Such attacks are likely to induce in the victims a sense of separation from and rejection by the larger community "that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Fear of such attacks is likely to terrorize members of the racial, religious, or other targeted group in a manner entirely unlike fear of ordinary random crime. It is for that reason that the investigation of organized attacks of this type are conducted under the Domestic Counterterrorism Program of the Federal Bureau of Investigation.[33]

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[32] *People v. Grupe*, 532 N.Y.S. 2d 815, 820, 141 Misc. 2d 6 (N.Y.Crim. Ct. 1988) ("bias-related violence [causes] emotional as well as physical scars.")

[33] F. Clarke, "Hate Violence in the United States", *FBI Law Enforcement Bulletin*, 14, 15 (January 1991.)

Crimes targeted at particular groups are likely to deter members of the victimized group from engaging in constitutionally or legally protected activities. The somewhat sparse legislative history of the Wisconsin law indicates that the state was particularly concerned with incidents of this sort. The sponsor[34] and supporters of the Wisconsin legislation pointed to three types of such protected activities which had been the focus of crimes targeted at particular groups.

First, they cited a highly publicized incident in which the home of a black resident in a predominantly white Milwaukee suburb had been vandalized.[35] One witness

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[34] We set out in Appendix B the statement issued by the sponsor of section 939.645 when it was introduced.

[35] Statement of State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988 ("Racial epithets were recently spray-painted on the home of a new black resident in the Milwaukee suburb or Brown Deer."); *Milwaukee Community Journal*, Nov. 18, 1987 (incidents the bill would cover include one in which "a Black woman living in Brown Deer returned to her home to find racist epithets scrawled on her door.") *Wisconsin State Journal*, January 8, 1988 ("The bill was motivated by such incidents as . . . the recent spray painting of racist slogans on a home bought by a black woman in the Milwaukee suburb of Brown Deer . . . .").

observed that such crimes obstructed Wisconsin's open housing law:

> Enactment of this legislation will further protect persons who exercise their right to live peacefully anywhere by greatly enhancing the punishment for criminal acts prompted by the race of the target or the target's property.[36]

This is the same concern which prompted Congress in 1988 to amend Title VIII to prohibit race based crimes connected with the ownership or rental of housing. See 42 U.S.C. §3631.

Second, supporters of the legislation pointed to criminal attacks against racial and religious minorities that had occurred on Wisconsin college campuses. In one repeatedly cited incident, members of an all-white fraternity at the University of Wisconsin-Madison had assaulted an African-American and a Jewish member of another

[36] Statement of Robert H. Friebert on Hate Crimes Bill, January 7, 1988, p.3.

fraternity while screaming racial and religious epithets.[37] This concern was consistent with a 1990 Minnesota Police Study that noted a serious upsurge in bias related attacks on campuses.[38] These incidents had become a major factor in

[37] Statement of State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988 (fraternity members "were assaulted in an incident in which anti-semitic and anti-black hostilities were expressed"); *Milwaukee Community Journal*, November 18, 1987 (bill would address recent assault on fraternity members "during which anti-Semitic and anti-Black hostilities were expressed."); Testimony in Support of AB 599 of Nancy Weisenberg, January 14, 1988. p. 2 (fraternity assault demonstrates need for legislation.) This assault is also discussed in articles in *The Defender* (November 9, 1987), *The Capitol Times* (December 19, 1987; December 21, 1987), and *The Milwaukee Journal* (November 1, 1987; November 4, 1987.) Other incidents of campus violence directed at minority groups are discussed in *The Milwaukee Journal*, May 6, 1987, and *The Guardian*, December 7, 1988.

[38] Minnesota Board of Peace Officer Standards and Training, *Bias Motivated Crimes* (1990):

> "The incidence of hate violence . . . on college campuses has dramatically increased . . . United States Justice Department figures show that the number of school-related, racial incidents investigated by the department increased by almost 50 percent in 1988. . . . Over the past several years, American Colleges and Universities have experienced a disquieting resurgence of racial and ethnic intolerance-most notably bias-related violence. . . . A 1987 study of ethnoviolence on campus . . . reported bias-motivated incidents on seventy campuses across the U.S."

Pp. 11-14. See C. Clay, "Campus Racial Tensions: Trend or Aberration?", *Thought and Education, the NEA Education Journal*,

deterring minority students from attending the University of Wisconsin at Madison.[39] It was particularly important that Wisconsin deal effectively with such on-campus discrimination, because racial incidents which deterred minorities from attending a college, or which created a hostile educational atmosphere, would place the university in violation of Title VI of the 1964 Civil Rights Act, and could lead to a termination of all federal financial assistance to the school. Cf. 29 C.F.R. §1604.11.

Third, supporters of the legislation expressed concern about a series of incidents in which buildings used for religious activities had been vandalized because of the

V(1) (Spring, 1990), pp. 21-36; L. Guydon, "Racial Turmoil Rising on U.S. Campuses", *Pittsburgh Post-Gazette*, May 11, 1989; C. Leatherman, "More Anti-Semitism is Being Reported on Campuses, But Educators Disagree on How To Respond To It," *Chronicle of Higher Education*, February 7, 1990, pp. A39-A40; National Institute Against Prejudice and Violence, *Ethnoviolence on Campus: The UMBC Study*, (1987); K. Stern, *Bigotry on Campus: A Planned Response* (1990).

[39] R. Jones, "Racist Incidents Hurt UW Recruiting Efforts", *Milwaukee Journal*, November 1, 1987.

religion of the congregants.[40] Congressional concern about similar incidents nationally led to the enactment in 1988 of 42 U.S.C. §247, which prohibits damage to religious property "because of the religious character of that property."

The states also have a vital interest in eradicating crimes targeted at distinct racial, religious or other groups because of the grave and unique danger that this particular category of crime will lead to further criminal acts. The example of one bias related crime is all too likely to trigger other similar attacks against the same victimized groups. Although racial, religious and other biases remain regrettably common in our society, few people who harbor such views ordinarily vent their biases through criminal acts. One such incident, however, may easily set an example that other individuals will follow. Equally seriously, even a single highly publicized incident can pose a grave risk that

[40] Statement by State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988; *Wisconsin Jewish Chronicle*, January 15, 1988; Statement of Robert H. Friebert on Hate Crimes Bill, January 7, 1988, p. 1; *Wisconsin State Journal*, January 8, 1988; Testimony of Nancy Weisenberg in Support of AB 599, January 14, 1988, p. 2.

retaliatory crimes will be committed against a victim of the same race, religion or ancestry as the original perpetrator. "Assaultive behavior motivated by bigotry . . . readily -- and commonly do[es] -- escalate from individual conflicts to mass disturbances." *People v. Beebe*, 67 Or. App. 738, 680 P.2d 11, 13 (1981).

Most importantly, crimes targeted at a particular racial, religious, or other group threaten, in the words of a recent Attorney General, "to tear apart the moral fabric of our society."[41] The world in which we live reminds us daily of the uniqueness and fragility of the tolerance that is the birthright of every American. From Sarajevo to the Sudan, from the Indian subcontinent to Nagorno-Karabagh, communities and nations are today being torn apart with

[41] Media Release, April 4, 1991. U.S. Department of Justice, Federal Bureau of Investigation, p. 1 (Attorney General Thornburgh.). See also Keynote Address by John R. Dunne, Assistant Attorney General, Civil Rights Division, Before the Anti-Defamation League, October 28, 1992, p. 4 ("I believe that today's 'public enemy no. 1' is not some bank robber or even some drug dealer. In my mind, public enemy no. 1 is that growing mob who commit crimes of hatred, tearing deep holes in the fabric that binds our society together. Their acts subvert our nation's promise of liberty and equality and they must be stopped.").

almost unimaginable ferocity and bloodshed by racial, ethnic, and religious differences. The promise of America is that the peoples who in the Old World nursed generations of hatred will here be able to live, work and prosper peacefully together, respecting and enriched by their differences, black and white, Arab and Jew, Christian and Muslim, Catholic and Protestant, Greek and Turk, Japanese and Chinese, Serb, Croat and Bosnian. It is a promise that brought millions of immigrants to our shores, and which our nation fought a Civil War to keep.

The state of Wisconsin has wisely enacted a variety of civil rights laws to safeguard that national commitment. The state has concluded, as reasonably it might, that in some circumstances the full force of the criminal law should be resorted to. That the state and national governments should deal firmly and effectively with racially and religiously targeted crimes is not merely constitutionally permissible; it is a moral and practical imperative in a nation as diverse as the United States. The First Amendment does not require

Wisconsin to stay its hand until its cities are divided by barricades and its neighborhoods have been devastated by "ethnic cleansing."

IV. ESTABLISHED CONSTITUTIONAL SAFEGUARDS SHOULD ASSURE THAT THE APPLICATION OF SECTION 939.645 IS CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS

(1) The court below argued that section 939.645 is unconstitutional because otherwise protected speech might be introduced in evidence to prove that a defendant selected his victim on the basis of race, etc. (Pet. App. A17-A19) That aspect of the Wisconsin court's decision is plainly inconsistent with this Court's decision in *Dawson v. Delaware*. *Dawson* held that evidence of otherwise protected speech can in fact be introduced, where relevant, in a criminal proceeding. 117 L.Ed. 2d at 316-17. *A fortiori* a criminal prohibition cannot be invalid merely because such evidence might be relevant in a proceeding to enforce that law.

Evidence of statements made by a criminal defendant are routinely introduced at either the guilt or penalty phase of a proceeding. Remarks by a defendant that he intends to commit a crime, such as "I am going to kill her"[42] or "I am going to pick up this guy and rob him,"[43] are exceedingly probative. Frequently statements by a defendant, such as threats of violence[44] or the offer of a bribe,[45] are part of the crime itself. Confessions[46] and implausible denials[47] may and often are introduced in evidence.

The existing decisions of this Court, if adhered to in the implementation of section 939.645, should be sufficient

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[42] *Lewis v. Jeffers*, 111 L.Ed. 2d 606,614 (1990).

[43] *Blystone v. Pennsylvania*, 494 U.S. 299, 301 (1990); see also *Sawyer v. Smith*, 111 L.Ed. 2d 193, 203 (1990) (defendant explained his actions were intended to show "just how cruel he could be"); *Stanford v. Kentucky*, 492 U.S. 361, 366 (1989)(defendant proposed to kill "whoever was behind the counter" because "a dead person can't talk"); *Thompson v. Oklahoma*, 487 U.S. 815, 860 (1988)(Scalia, J., dissenting)("We're going to kill Charles.")

[44] *Williams v. United States*, 117 L.Ed. 2d 341, 351 (1992).

[45] *Evans v. United States*, 119 L.Ed. 2d 57,65 (1992).

[46] *Illinois v. Perkins*, 110 L.Ed. 2d 243, 252 (1990).

[47] *Estelle v. McGuire*, 116 L.Ed. 2d 385, 394 (1991).

to prevent that provision from being abused. Where a defendant was engaged in the types of political activity that lie at the core of First Amendment values, a state must with exactitude distinguish between protected activities and activities which are unlawful. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). "[T]here must be 'clear proof that a defendant "specifically intend[s] to accomplish [his or her aims] by resort to" ' " criminal conduct. *Id.* at 919. "[T]his intent must be judged 'according to the strictest law,' for 'otherwise there is a danger that one in sympathy with . . . legitimate aims . . . but not specifically intending to accomplish them by resort to [unlawful conduct], might be punished for his adherence to lawful and constitutionally protected purposes . . . .'" *Id.* The appellate courts have a constitutional responsibility to conduct an independent examination to ascertain a statute has been constitutionally applied. *Id.* at 915 n. 50.

The likelihood that section 939.645 would have any significant chilling effect is remote. In order to be subject

to the Wisconsin statute, a defendant must first have committed a separate criminal offense. Thus, section 939.645 by its very nature could not have a deterrent effect on anyone except an individual who already contemplates committing a crime. The number of such individuals is of course small in comparison with the total population, and criminals as a group are virtually by definition not easily deterred by fear of criminal sanctions.

Were a prosecutor to offer evidence of statements on racial or religious issues in an attempt to prove the *guilt* of a defendant, the First Amendment problems would be more serious. Even individuals who had committed no crime, and had no intent to do so, could legitimately be deterred from making statements which might result in an indictment and trial. The First Amendment has long been understood to bar prosecution for impassioned and inflammatory statements that fell short of a call for imminent lawless action; the use of those same statements to prove complicity in a non-speech crime could raise similar constitutional

issues. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 924-930. As a practical matter, generalized statements reflecting racial or religious bigotry, although quite probative in a Title VII case, would be worth significantly less in a case in which a plaintiff or prosecutor alleged a defendant had engaged in violent conduct. At the height of Jim Crow, when most of the white population of the South was biased against African Americans and practiced discrimination in virtually all aspects of their lives, only a relatively small number of individuals resorted to violence to preserve segregation. In our own era, although lingering racial and religious prejudices and stereotyping remain all too common, most Americans who still entertain such views do not express them through assault, murder, or acts of terrorism. For that reason, evidence of a defendant's statements regarding racial or religious issues may only be adduced to demonstrate guilt of a crime where there is a nexus between those statements and criminal activity. See, e.g., *Barclay v.*

Florida, 463 U.S. 939 (1983); *United States v. Mills*, 704 F.2d 1553, 1558-60 (11th Cir. 1983).

(2) In determining whether to admit into evidence statements made by a defendant which reveal racial or religious bias, a court must weigh the probative value of the evidence against its potential to unfairly prejudice a jury against that defendant. See Rule 403, Fed. R. Evid. That risk is obviously particularly great where a jury is composed largely or exclusively of members of the group against which the defendant has made biased statements. Under some circumstances the admission of inflammatory evidence of little or no relevance would violate the Due Process Clause. *Payne v. Tennessee*, 115 L. Ed. 2d 720, 739-40 (O'Connor, J., concurring), 743 (Souter, J., concurring) (1991).

(3) Although section 939.645 could literally be applied to a defendant who selected as his victim a member of his own race or religion, as a practical matter most applications of the Wisconsin law will involve crimes committed by a member of one racial or religious group

against a member of another. The states are free to impose an enhanced penalty where a victim was chosen on the basis of race, or where a crime was racially motivated, but the states may not impose such an enhanced penalty merely because the perpetrator and victim were of different races or different faiths. A state may not inflict an enhanced penalty because of the race of a victim, *McCleskey v. Kemp*, 481 U.S. 279, 292 n. 8 (1987), or because of the race of the perpetrator. 18 U.S.C. §242. *McCleskey* makes clear that a state could not, for example, impose a greater sentence on blacks who kill whites than on whites who kill blacks. Such enhanced penalties for inter-racial crimes were one of the evils of the Slave Codes and Black Codes which the Fourteenth Amendment was adopted to end.

The rule in *McCleskey* would be entirely eviscerated if under section 939.645 a jury were permitted to infer that a victim had been selected on the basis of race from the mere fact that the perpetrator and victim were of different races. The quantum of additional evidence necessary to

justify submitting a section 939.645 issue to a jury should be great enough to exclude *most* interracial crimes, and thus "genuinely narro[w]" the law. *Barclay v. Florida*, 463 U.S. 939, 960 (1983). The Wisconsin courts appear to construe section 939.645 to require substantially more than that a perpetrator and victim were of different races or religions. (Pet. App. A43, A108.)

(4) In the instant case the Wisconsin law requires the state to prove beyond a reasonable doubt that a victim was chosen on the basis of race or religion, and the jury was so instructed. By placing this burden on the prosecution, Wisconsin has materially reduced the danger that section 939.645 might be applied under circumstances which would violate the First or Fourteenth Amendments. The necessity of finding race or religion based victim selection beyond a reasonable doubt makes it less likely that a jury would apply the section on the basis of statements of little direct relevance, or of evidence consisting primarily of the fact that

the perpetrator and victim belonged to different religious or racial groups.

Many states deal have chosen to deal with the problem addressed by section 939.645 by providing that a separate crime occurs where a perpetrator selects his a victim, or commits a crime, on the basis of race or religion. Where state law defines this conduct as constituting a distinct crime, a number of constitutional safeguards apply, including a requirement of proof beyond a reasonable doubt. Although the states enjoy considerable leeway in deciding whether to treat motive or conduct as an additional crime, or as a factor in sentencing, at some point a sentence enhancement could be so great as to require application of the constitutional safeguards applicable to proof of a distinct crime, including proof beyond a reasonable doubt that the greater sentence should be imposed. In the instant case section 939.645 increases the maximum permissible sentence for aggravated battery, the crime of which Mitchell was convicted, from two to five years, and Mitchell was in fact

sentenced to four years in jail. Since Wisconsin law itself required the prosecution to establish beyond a reasonable doubt the applicability of section 939.645, there is no need for the Court to determine in this case whether the Due Process Clause itself required the prosecution to do so.

CONCLUSION

For the above reasons, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

JANUARY 1993 FBI HATE CRIME STATISTICS

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

FOR IMMEDIATE RELEASE

Director William S. Sessions today released the first data available from the FBI's statistical program on hate crimes. The program was initiated in response to the Hate Crime Statistics Act of 1990 and is being implemented by law enforcement agencies across the Nation. "While these initial data are limited," commented Director Sessions, "they give us our first assessment of the nature of crimes motivated by bias in our society." The data cover calendar year 1991 and were supplied by nearly 3,000 law enforcement agencies in 32 states. Hate crime occurrences were recorded by 27 percent of the 2,771 agencies participating; the remainder reported no such offenses came to their attention.

A total of 4,558 hate crime incidents involving 4,755 offenses were reported in 1991. Among the offenses measured, intimidation was the most frequently reported hate crime, accounting for 1 of 3 offenses. Following were destruction/damage/vandalism of property, 27 percent; simple assault, 17 percent; aggravated assault, 16 percent; and robbery, 3 percent. The remaining offense types; murder, forcible rape, burglary, larceny-theft, motor vehicle theft, and arson; each accounted for 1 percent or less of the total.

Racial bias motivated 6 of 10 offenses reported; religious bias, 2 of 10; and ethnic and sexual-orientation bias, each 1 of 10. Among the specific bias types, anti-black offenses accounted for the highest percentage, 36 percent of the total. Anti-white and anti-Jewish motivations followed with 19 and 17 percent, respectively.

Information concerning the offenders was unknown for 43 percent of the incidents reported. Considering incidents for which suspected race of the offender was

reported, 65 percent of the hate crimes were committed by whites, 30 percent by blacks, and 2 percent by persons of other races. The remainder of the incidents were committed by groups of offenders not all of the same race.

The accompanying tables provide specific hate crime data. A more comprehensive report is planned for the spring of 1993.

Hate Crime Offense Codes Reported, 1991

	Number	Percent*
Murder	12	0.3
Forcible Rape	7	0.1
Robbery	119	2.5
Aggravated Assault	773	16.3
Burglary	56	1.2
Larceny-theft	22	0.5
Motor Vehicle Theft	0	0.0
Arson	55	1.2
Simple Assault	796	16.7
Intimidation	1,614	33.9
Destruction/Damage/ Vandalism of Property	1,301	27.4
Total Number of Offense Types	4,755	100.0

*Because of rounding, percentages do not add to total.

Hate Crime Bias-Motivations Reported 1991

Bias-Motivation	Number	Percent*
Race	2,963	62.3
Anti-White	888	18.7
Anti-Black	1,689	35.5
Anti-American Indian/ Alaskan Native	11	0.2
Anti-Asian/Pacific Islander	287	6.0
Anti-Multi-Racial Group	88	1.9
Ethnicity	450	9.5
Anti-Hispanic	242	5.1
Anti-Other Ethnicity/ National Origin	208	4.4
Religion	917	19.3
Anti-Jewish	792	16.7
Anti-Catholic	23	0.5
Anti-Protestant	26	0.5
Anti-Islamic (Moslem)	10	0.2
Anti-Other Religion	51	1.1
Anti-Multi-Religious Group	11	0.2
Anti-Atheism/Agnosticism/ etc.	4	0.1
Sexual Orientation	425	8.9
Anti-Homosexual	421	8.9
Anti-Heterosexual	3	0.1
Anti-Bisexual	1	0.0
Total	4,755	100.0

*Because of rounding, percentages may not add to totals.

Suspected Race of Offenders in Hate Crimes, 1991

Suspected Race of Offender	Number of Incidents	Percent
White	1,679	36.8
Black	769	16.9
American Indian/ Alaskan Native	12	0.3
Asian/Pacific Islander	47	1.0
Multi-racial group	77	1.7
Unknown	1,974	43.3
Total Incidents	4,558*	100.0

*A single incident may involve more than one offense.

Agency Participation in Hate Crime Reporting, 1991

State	Agencies Participating*	Incidents Reported
ARIZONA	1	48
ARKANSAS	169	10
CALIFORNIA	2	5
COLORADO	194	128
CONNECTICUT	29	69
DELAWARE	58	29
GEORGIA	2	23
IDAHO	98	33
ILLINOIS	26	133
INDIANA	1	0
IOWA	201	89
KANSAS	3	6
KENTUCKY	1	0
LOUISIANA	6	0
MARYLAND	156	431
MASSACHUSETTS	30	200
MINNESOTA	42	225
MISSISSIPPI	4	1
MISSOURI	18	136
NEVADA	1	16
NEW JERSEY	271	895
NEW MEXICO	1	0
NEW YORK	773	943
OHIO	30	80
OKLAHOMA	7	99
OREGON	39	296
PENNSYLVANIA	50	277
TENNESSEE	2	1

TEXAS	28	95
VIRGINIA	19	53
WASHINGTON	206	196
WISCONSIN	303	41
Total	2,771	4,558

*Includes agencies participating in Program whether or not any incidents were experienced.

APPENDIX B

STATEMENT OF SPONSOR OF SECTION 939.645

[Letterhead Omitted]

STATEMENT BY STATE SENATOR MORDECAI LEE
SENATE JUDICIARY COMMITTEE PUBLIC HEARING ON SB 442
JANUARY 7, 1988

One of the great lessons of history is that a system of government or justice is only as good as its ability to protect the rights of the minority. Right now there seems to be an increase in the incidence of crimes that are motivated by religious or social hatred, known as 'hate crimes.' I believe we need to keep our history lessons in mind and change Wisconsin's laws to address the problem of hate crimes.

Racial epithets were recently spray-painted on the home of a new black resident in the Milwaukee suburb of Brown Deer. Swastikas were painted on a synagogue in Ozaukee County. Catholics were harassed by a group called the 'Alamo Foundation,' and here in Madison members of a Jewish fraternity were assaulted in an incident in which anti-semitic and anti-black hostilities were expressed.

Representative Louis Fortis and I introduced Senate Bill 442 at the request of a broad coalition of organizations, including Christian, Jewish, black, disabled and Native American groups. This bill is one step toward combatting these far-reaching and intimidating crimes.

Senate Bill 442 proposes additional criminal penalties when an offense is proven to have been motivated by religious or social bias. Secondly, it creates a new category of criminal damage to property when such property is a church, synagogue, cemetery, ethnic center or 'venerated object,' a term I hope will be added to the bill in a clarifying amendment. Finally, the bill gives victims of hate crimes more opportunities for civil actions against persons who commit such crimes.

Fifteen other states, including Ohio and Illinois, have recognized the need to enhance penalties for hate crimes. It's important to remember that the victims of hate crimes extend far beyond the direct victims of a racially or socially biased assault or act of vandalism. Entire communities become the victims, and I fear we're seeing this kind of thing more and more often.

I hope that you'll agree to address the problem of hate crimes and support this bill.

No. 92-515

JAN 28 1993

OFFICE OF THE CLERK

IN THE

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OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the First Amendment prohibits States from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status.

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United States v. O'Brien, 391 U.S. 367 (1968) 10
Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 18
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MISCELLANEOUS

Bias Crime: The Law Enforcement Response (Nancy Taylor ed., 1991) 3
M. Cherif Bassiouni, *Substantive Criminal Law* (1978) 17
William L. Burdick, *The Law of Crimes* (1946) 17
J. David Coldren, *Bias Crimes: State Policy Considerations, in Bias Crime: The Law Enforcement Response* 127 (Nancy Taylor ed., 1991) 6

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James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes, in Bias Crime: The Law Enforcement Response* 17 (Nancy Taylor ed., 1991) 6
Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* (1989) 17
Robert J. Kelly, *Bias-Motivated Crime, in Bias Crime: The Law Enforcement Response* 135 (Nancy Taylor ed., 1991) 6
Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 Stan. L. & Pol'y Rev. 165 (Winter 1992-93) 6
William A. Marovitz, *Hate or Bias Crime Legislation, in Bias Crime: The Law Enforcement Response* 1 (Nancy Taylor ed., 1991) 6, 6-7
Werner Petterson, *Awareness Training for Police: Bias-Motivated Crimes, in Bias Crime: The Law Enforcement Response* 35 (Nancy Taylor ed., 1991) 6
1 John W. Strong, *McCormick on Evidence* (4th ed. 1992) 19
U.S. Conference of Mayors, *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities* (June 1992) 2
Joan C. Weiss, *Ethnoviolence: Impact and Response in Victims and the Community, in Bias Crimes: The Law Enforcement Response* 93 (Nancy Taylor ed., 1991) 6

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compel-

ling interest in legal issues that affect the power of state and local governments to carry out their responsibilities to their citizens, including the responsibility to protect and preserve public safety and order.

"Hate crimes" are an escalating phenomenon throughout the nation and are dangerously corrosive of the social fabric. Indeed, they present one of the most serious threats to a civilized society of our time. *See* U.S. Conference of Mayors, *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities* (June 1992). Because of their gravity, bias-related crimes have elicited strong responses from the majority of States and many local governments, *see id.*, including penalty enhancement statutes of the type at issue here. The Wisconsin statute is a valid and reasonable legislative response to this serious threat to public safety and order, and falls within an area that the Court has long regarded as the province of state legislatures. *See, e.g., Harmelin v. Michigan*, 111 S. Ct. 2680, 2703-04 (1991) (Kennedy, J., concurring).

Because of the importance of the issue presented to *amici* and their members as well as its implication for other anti-discrimination legislation, *amici* submit this brief to assist the Court in its resolution of the case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Nothing in the First Amendment prohibits a State from punishing a person convicted of a crime more severely when that person intentionally selects the victim of the crime because of race or other specified status. To the contrary, there is a compelling state interest in the prevention of such crimes. Under our federal scheme of government, States are charged with protecting and preserving the public safety through their police power. The sad truth is that States and local governments increasingly find their citizens the targets of crime simply because of their race, religion, sexual orientation or other group status. Such crimes are more serious in their repercussions than similar crimes committed without such victim selection; they adversely affect not only the victim, but also the members of the group to which the victim belongs and indeed tend to polarize the entire community. *See Bias Crime: The Law Enforcement Response* (Nancy Taylor ed., 1991). These crimes need to be dealt with more severely to preserve the public safety of our society and the civil rights of all citizens.

The Wisconsin statute at issue here avoids the constitutional problems raised by the St. Paul ordinance in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), because it is directed at criminal conduct and not at thought or expression. It is triggered only when an individual has selected a victim based upon that victim's race, religion or other protected characteristic *and* has then proceeded to commit a crime against that victim. In this case, respondent received an enhanced sentence not for his thoughts or words, but rather for acting upon those thoughts and words in a violent, unprovoked attack upon a victim selected because of his race.

Nor does the penalty enhancer statute indirectly chill thought or expression. The statute did not preclude Mr. Mitchell from feeling outraged at the historical mistreatment of blacks. Nor did it preclude him from communicating his feelings. Indeed, if Mr. Mitchell had merely communicated racial animosity rather than act on his prejudices, the penalty enhancement statute would never have come into play. What Wisconsin has sought to—and has every right to—deter is the next step: the act of hunting down and assaulting a 14 year old boy because of his race.

Such enhancement of criminal sentences does not offend the First Amendment's limitations on the regulation of thought or expression. Moreover, it is consistent with fundamental premises of both general sentencing law and mainstream civil rights legislation. Essentially, Wisconsin has made it a relevant sentencing consideration that, in violating the State's Criminal Code, the defendant has selected his victim based on a criterion such as race. Considering such a factor at sentencing is hardly novel; a defendant's motive for engaging in criminal conduct, whether pecuniary gain, personal animosity or racial hatred, has always been a legitimate factor to be considered by the sentencing judge. *See Williams v. New York*, 337 U.S. 241, 245 (1949).

Moreover, contrary to the conclusion of the court below, there is no principled distinction between the penalty enhances and other anti-discrimination legislation. Both are directed against unlawful conduct that is based on the victim's protected characteristics. Both require a discriminatory "thought" that is accompanied by an act of some kind. By attaching legal consequences to the singling out of crime victims on the basis of race, religion, or other such

characteristics, the Wisconsin penalty enhancer operates like other anti-discrimination laws. If respondent's enhanced sentence violates the First Amendment, it is questionable whether employers or landlords can be held liable when they engage in invidious discrimination.

ARGUMENT

I. IT IS THE CONSTITUTIONAL ROLE OF THE STATES TO PRESERVE THE PUBLIC SAFETY AND ORDER.

Under the scheme of federalism embodied in our Constitution, it is States and local governments that in the first instance are charged with protecting and preserving the public safety and order. They do so not only to ensure safety, but to foster a civilized society in which individual rights may be freely exercised by all. Through the use of their "police power," States and local governments carry out their function of preserving public order by proscribing conduct that is destructive of our system of ordered liberty. Indeed, it is a fundamental role of the States to do so. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."); *Breard v. City of Alexandria*, 341 U.S. 622, 640 (1951).

In seeking to provide public safety and order, States are increasingly confronted with the problem of violent attacks committed against their citizens for no reason other than that citizen's skin color, perceived national origin, religious affiliation, or other characteristics. As state and local governments throughout the nation have realized, these attacks pose serious and unique problems.

These so-called "hate crimes" are more likely to be violent [2] and to be perpetrated against complete strangers than are other crimes.[3] Victims of these crimes are subject to a more profound and pervasive sense of vulnerability [4] which may lead to their withdrawal from community life.[5] Moreover, such crimes harm not only their direct victim, but also those in the group to which the victim belongs.[6] In this manner, hate crimes fragment and polarize communities, creating tension and triggering unrest and retaliation.[7] The destructive potential of hate crimes has been illustrated by the racially-motivated Howard Beach and Bensonhurst crimes in New York City, each of which triggered "waves of less serious incidents, such as minor assaults, harassments, and vandalisms, in which offenders invoked those crimes as rationales for their behaviors." James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes, in Bias Crime* 17, 18.

[2] Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. Law & Pol'y Rev. 165, 166-67 (Winter 1992-93).

[3] *See, e.g.*, William A. Marovitz, *Hate or Bias Crime Legislation, in Bias Crime: The Law Enforcement Response* 1, 2 (Nancy Taylor ed., 1991). This compilation by Nancy Taylor is hereafter cited as "*Bias Crime.*"

[4] *See* James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes, in Bias Crime* 17, 17-18; Joan C. Weiss, *Ethnoviolence: Impact and Response in Victims and the Community, in Bias Crime* 93, 100.

[5] *See, e.g.*, Weiss, *Ethnoviolence, supra*, at 100.

[6] *See, e.g.*, Robert J. Kelly, *Bias-Motivated Crime, in Bias Crime* 135, 135; Werner Petterson, *Awareness Training for Police: Bias-Motivated Crimes, in Bias Crime* 35, 37; Marovitz, *Hate or Bias Crime Legislation, supra*, at 2-3.

[7] *See, e.g.*, Marovitz, *Hate or Bias Crime Legislation, supra*, at 2; J. David Coldren, *Bias Crimes: State Policy Considerations, in Bias Crimes* 127, 127.

Because hate crimes are more damaging than other crimes, both to the individual victim and to the greater community, it is entirely appropriate that the more harmful nature of the crime be reflected in an enhanced penalty. Inherent in our system of criminal justice is the idea that more serious crimes—that is, crimes causing a greater amount of harm—can be punished more severely than lesser crimes. As the Court noted in *Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991),

> the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.

Not only is the imposition of a harsher penalty for a more harmful crime fair, it also leads to an appropriately elevated level of deterrence for the more severe crime. The destructive nature of bias-based crimes was justifiably condemned—and the compelling interest in preventing them recognized—by this Court itself in *R.A.V.* *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992); *id.* at 2556 (White, J., concurring).

In order to maintain public peace and order, the State of Wisconsin adopted a reasonable statutory solution designed to break this cycle of violence. Section 939.645 enhances the penalty to which a convicted criminal can be sentenced upon a finding by

the trier of fact that the criminal "[i]ntentionally select[ed] the person against whom the crime . . . [was] committed . . . because of" the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.[8] The enhanced penalty is meant both to deter criminal acts against such victims, and, if that fails, to enable the sentencing judge, when appropriate, to punish the criminal more severely because of the increased severity of the crime. The Wisconsin statute also lessens the possibility of retaliation by reassuring the community at large that the State has recognized the problem and is addressing it.

Under the Constitution, state legislatures are given wide latitude to find solutions to the problems facing their communities, as long as those solutions do not offend constitutionally protected rights. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The Court has expressly recognized the need for deference to legislative judgments concerning the length of sentences. *See Rummell v. Estelle*, 445 U.S. 263, 274 (1980) ("the length of the sentence actually imposed is purely a matter of legislative prerogative"); *Gore v. United States*, 357 U.S. 386, 393 (1958); *see also Harmelin*, 111 S. Ct. at 2703-04 (Kennedy, J., concurring). *Cf. Cicenia v. La Gay*, 357 U.S. 504, 510 (1958) ("This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.'") (citation omitted). In this case, the Court need only address the constitutional issue raised by the Wisconsin Supreme Court's invalidation of section 939.645, namely, whether it is precluded by the strictures of

[8] The full text of the statute is set forth at Pet. App. 72-73.

the First Amendment. As the remainder of this brief will show, the statute does not violate the First Amendment.

II. THE FIRST AMENDMENT DOES NOT PROHIBIT AN ENHANCED SENTENCING OPTION FOR A CRIME INTENTIONALLY PERPETRATED BECAUSE OF THE VICTIM'S RACE OR OTHER GROUP STATUS.

A. The Penalty Enhancer Statute Addresses Conduct, Not Speech.

The Wisconsin statute allows for an enhanced sentence for those whose criminal acts are intentionally directed at a person because of the race, religion, disability, sexual orientation, national origin or ancestry of the victim. Such conduct is not afforded First Amendment protection.

Although the First Amendment admittedly protects certain types of conduct in addition to spoken or written words, *see Texas v. Johnson*, 491 U.S. 397, 404 (1989), its protection of conduct is narrowly circumscribed. The First Amendment's protections extend only to conduct that has such communicative content as to be the virtual equivalent of printed or spoken words. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974); *Johnson*, 491 U.S. at 403. Conduct that is not "sufficiently imbued with elements of communication" is not afforded any special protection. *Spence*, 418 U.S. at 409. The mere fact that a person claims to be expressing himself or herself through conduct does not itself vest that conduct with First Amendment protection; the conduct must have such recognizable "communicative connotations" that "the likelihood [is] great that the message would be understood by those who viewed it." *Id.* at 410-11. Thus, the Court has expressiy rejected "the view that an

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). In addition, as the Court noted last term in *R.A.V.*, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S. Ct. at 2546-47.

The penalty enhancer regulates only conduct that constitutes a crime under the Wisconsin Criminal Code. The commission of such crimes is not "expressive conduct" protected by the First Amendment; aggravated battery is not protected speech. The Wisconsin statute merely enhances the punishment for criminal conduct that has particularly egregious societal consequences. Victimizing a person because of his race or religion does not bring criminal conduct within the protection of the First Amendment.

That the Wisconsin statute is directed at conduct rather than expression distinguishes it from the "fighting words" ordinance struck down in *R.A.V.* The ordinance invalidated in *R.A.V.* criminalized placing "on public or private property a symbol, object, appellation, characterization or graffiti . . .which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, 112 S. Ct. at 2541. By its terms, the St. Paul ordinance was directed at expression; it applied exclusively to symbols of bigotry with "communicative connotations" that would readily "be understood by those who viewed [them]." *Spence*, 418 U.S. at 410-11. The Court thus held that such a prohibition of "messages of 'bias-motivated' hatred," *R.A.V.*, 112 S. Ct. at

2548, was impermissible because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542.

By contrast, the criminal acts covered by the Wisconsin statute are not "otherwise permitted speech." Assault, arson, robbery, and the like have never been considered to be protected speech. Such conduct has never been held to be "sufficiently imbued with elements of communication," *Spence*, 408 U.S. at 407, to be protected speech under the First Amendment. Enhancing possible penalties for such conduct when it is directed at victims selected because of their "race, religion, color, disability, sexual orientation, national origin or ancestry," Wis. Stat. § 939.645, does not convert crime into protected speech.

The Wisconsin Supreme Court nonetheless concluded that the penalty enhancer violates the First Amendment because it "punishes bigoted thought." Pet. App. 8. The court reasoned that as the underlying criminal actions were already punishable under the Wisconsin Criminal Code, the statute necessarily punished pure thoughts and ideas. This syllogism, however, does not withstand analysis. The statute does not allow for enhanced penalties merely for an abstract thought, or even a communicated one. No enhancement is possible—indeed, no crime occurs—unless the actor *acts* on his or her victim selection and commits a crime based thereon, a crime more serious than a common battery because of the societal ramifications of a crime based on the victim's group status. A person remains free under the statute to harbor bigoted thoughts, no matter how repugnant to the remainder of society. Indeed, a person is free,

under the statute, to give voice to those thoughts.[9] The statute takes effect only when a person turns those thoughts into action. As the Court made clear in *R.A.V.*, a State may prohibit actions directed at particular groups or persons as long as the actions are not protected speech. *R.A.V.*, 112 S. Ct. at 2548 ("a prohibition of fighting words that are directed at certain persons or groups . . . would be facially valid" under the First Amendment). The enhancer, far from punishing bigoted thought as such, does no more than punish criminal actions taken against victims because of their immutable characteristics.

Because it criminalizes only action, the Wisconsin statute has no "chilling effect" on speech. It does, however, have a deterrent effect—a wholly permissible one. The Wisconsin statute aims to deter the commission of those crimes that take place because of the victim's race or other characteristics. It chills not thought, but the conversion of certain thoughts into criminal conduct.[10] If such action is indeed chilled, no "idea" is lost, but criminal conduct is prevented.

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[9] Although the Wisconsin statute does not come into play until victim selection is acted upon, speech urging the targeting of victims can, under certain circumstances, itself be regulated consistently with the First Amendment. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (A State may forbid "advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[10] *Cf. United States v. Grayson*, 438 U.S. 41, 54 (1978) ("Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.").

B. Use Of Evidence Of Speech Does Not Offend First Amendment Values.

The essence of the penalty enhancer statute—and the basis for the First Amendment challenge to it—is its differentiation of criminal conduct depending on whether the defendant intentionally selected his victim based on race, religion or certain other characteristics. If so, he may receive a more severe sentence for that crime.

Treating acts differently depending on the reasons behind them is a notion deeply imbedded in our law and does not violate the First Amendment. The examination of a defendant's motive, solely for purposes of determining an appropriate sanction for his *actions*, is integral to the areas of law implicated by the penalty enhancer: sentencing and anti-discrimination law. In each area, the law can validly determine the defendant's motive and evaluate his actions accordingly in determining the proper response thereto. Far from being a First Amendment violation, this process is a necessary step toward the laudable goals of rooting out invidious discrimination and dealing appropriately with criminal activity.

1. "Motive" Is A Legitimate Sentencing Consideration.

The penalty enhancer is in form a law of sentencing; it provides the judge with the option of imposing a heavier sentence than would otherwise be available because of the community's view of the severity of the criminal conduct at issue. In matters of sentencing, the law traditionally permits almost unlimited consideration of the defendant's background, behavior and relevant thoughts in determining a proper sentence.

As this Court has often recognized, the sentencing judge has broad discretion in imposing sentences and may properly consider a wide variety of factors, including the defendant's motive in committing the crime. In *Williams v. New York*, for example, this Court upheld a New York procedure that permitted the sentencing judge to consider "information about the convicted person's past life, health, habits, conduct and mental and moral propensities." 337 U.S. 241, 245 (1949). As the Court noted, "[h]ighly relevant, if not essential to [the trial judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. *See also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."); 18 U.S.C. § 3577 ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense" which the court can consider in determining "an appropriate sentence.").

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), this Court recently upheld, against a First Amendment challenge, consideration of a defendant's beliefs as a factor in imposing the ultimate sentence of death. The Court found that

> the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Id. at 1097. Although the Court rejected the specific evidence in that case—a stipulation concerning defendant's membership in a racist prison gang—it did so based on the lack of a sufficient showing of the relevance of that evidence. There was no racial element to the crime, and the narrow stipulation "proved nothing more than Dawson's abstract beliefs." *Id.* at 1098. The Court specifically suggested that a more relevant factual showing concerning the relationship between the defendant's gang membership and relevant sentencing criteria would have satisfied the First Amendment. *Id.* at 1097, 1098.

An example of the permissible use of evidence of racial hatred for sentencing purposes is found in *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, the defendant was sentenced to death based, in part, on evidence that the murder in question was motivated by the desire to start a race war. The plurality noted that the Constitution "does not prohibit a trial judge from taking into account the elements of racial hatred in this murder." *Id.* at 949 (opinion of Rehnquist, J.).

All of these approaches to sentencing are—like the Wisconsin law—valid under the First Amendment because they do not attempt to regulate or suppress ideas or expression. They employ the universally recognized prerogative of the sentencing authority to consider a broad array of information about the convicted criminal, including ideas or thoughts which led to the commission of the offense, or which show the likelihood of recurrence, in determining the appropriate sentence.

2. *There Is No Principled Distinction Between The Penalty Enhancer And Other Anti-Discrimination Statutes.*

The Wisconsin Supreme Court invalidated the penalty enhancer statute on the grounds that it created a "thought crime," apparently because use of the statute required consideration of what it termed "motive," *i.e.*, the reason for committing a crime, rather than simply "intent," *i.e.*, the necessary state of mind for a criminal act. Pet. App. 20-21. Recognizing that the logical implication of its reasoning could lead to the wholesale invalidation of numerous other anti-discrimination statutes, the court attempted to distinguish those statutes as prohibiting "objective acts of discrimination" in contrast to the penalty enhancer, which it described as punishing not an "objective" act but "a subjective mental process." Pet. App. 20 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2). The court's reasoning is erroneous.

As an initial matter, the Wisconsin court's distinction between "motive" and "intent" is irrelevant in First Amendment analysis. The First Amendment protects ideas and their expression. As the Court noted in *R.A.V.*, even content-based regulation may be valid under the First Amendment so long as "there is no realistic possibility that official suppression of ideas is afoot." 112 S. Ct. at 2547. The Wisconsin statute is not targeted at the suppression of ideas. It deals with criminal activity perpetrated against victims selected because of characteristics such as their race or religion.

The Wisconsin statute does not penalize abstract hatred of racial, religious or other groups, or communicative expressions of that abstract hatred.

Rather, it penalizes the conduct of a person who acts on his hatred in violation of the Criminal Code. Because such a crime has a greater cost to society, the Wisconsin statute appropriately provides for a greater punishment for this conduct.[11]

Amici respectfully submit that no principled distinction can be drawn between the penalty enhancer and other anti-discrimination statutes. The latter

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[11] The distinction between "motive" and "intent" embraced by the court below, in addition to being immaterial for First Amendment purposes, is questionable. The statute asks *whether* the defendant intentionally selected his victim because of that victim's group status; it does not inquire *why* a defendant selected a victim of a particular race or religion. In this respect the statute is akin to a specific intent crime, *i.e.*, a crime which requires that an act "be done with some specified further purpose in mind," or "a crime that requires subjective awareness of some specific circumstance." Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 230 (1989); *see also* M. Cherif Bassiouni, *Substantive Criminal Law* 177-78 (1978); William L. Burdick, *The Law of Crime* § 120 at 139-40 (1946). Because the statute allows for enhancement only if the State has proved the intentional selection on the basis of race beyond a reasonable doubt, *see* Wis. Stat. § 939.645, the statute, in effect, creates a scheme of greater and lesser included offenses. Most States have enacted statutory schemes under which proof of certain specific intent crimes (*e.g.*, burglary, assault with intent to kill) necessarily encompasses proof of lesser included offenses (*e.g.*, breaking and entering, assault). *See* Burdick at 140. Conviction of, and punishment for, the commission of these greater offenses necessarily requires an inquiry into the mental state of the defendant. But this process hardly renders these offenses "thought" crimes. Rather, these greater offenses are concerned solely with "objective acts" in a manner comparable to the Wisconsin statute here.

enhance the protection afforded individuals when they are victims of discrimination on the basis of protected characteristics such as race, religion and national origin. The Wisconsin statute, like these other anti-discrimination statutes, validly attempts to protect citizens from being victimized on the basis of such characteristics. *See R.A.V.*, 112 S. Ct. at 2546-47 (distinguishing the operation of Title VII from the St. Paul ordinance struck down in that case).

What all these laws have in common is that they are all "victim selection" laws. All of them prohibit, through civil or criminal sanctions, certain actions when those actions are undertaken because of the status of the person suffering adverse consequences. These statutes routinely require proof of discriminatory "animus" or purpose as an element of a claim. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) ("[W]e also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive.").

The distinction relied upon by the court below—that the penalty enhancer punishes a "subjective mental process" but that anti-discrimination laws punish an "objective act", Pet. App. 20—does not withstand analysis. Both the Wisconsin statute and anti-discrimination laws require a discriminatory motive or "animus" and an act of some kind. Both seek to deter or punish unlawful conduct, but before doing so require proof of the "thought" that underlies the act.[12] By attaching legal consequences to the singling out of crime victims on the basis of race, religion, or other immutable characteristics, the Wisconsin penalty enhancer operates in the same manner as other anti-discrimination laws. If the First Amendment does not allow Wisconsin to punish respondent for the criminal conduct he engaged in because of his victim's race, then it is questionable whether employers or landlords can be held liable for their discriminatory conduct.

[12] The court below was also concerned about the fact that the penalty enhancer allowed the prosecution to introduce evidence of statements by Mr. Mitchell that advocated crime against white people, on the ground that this might chill the expression of such ideas. The admission of evidence of motive in a prosecution under the penalty statute no more chills expression than the admission of statements to establish motive in other criminal prosecutions. Evidence of motive is routinely admitted in criminal cases. *See* Fed. R. Evid. 404(b); 1 John W. Strong, *McCormick on Evidence* § 190 (4th ed. 1992). It frequently includes such spoken words as admissions of the defendant. Fed. R. Evid. 801(d)(2).

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be reversed.

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January 28, 1993

No. 92-515

FILED
JAN 28 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY, THE AMERICAN JEWISH CONGRESS, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR WOMEN POLICY STUDIES, THE FRATERNAL ORDER OF POLICE, THE HUMAN RIGHTS CAMPAIGN FUND, THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL GAY AND LESBIAN TASK FORCE, THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, THE POLICE EXECUTIVE RESEARCH FORUM, THE SOUTHERN POVERTY LAW CENTER, AND THE UNION OF AMERICAN HEBREW CONGREGATIONS, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

A. The Anti-Defamation League

The Anti-Defamation League ("ADL"), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For almost 80 years, ADL has been active in the fight against discrimination in employment, housing, education, and public accommodations. ADL also believes very strongly that the First Amendment embodies core civil rights that are essential to ADL's ultimate purpose.

In 1981, after three consecutive years in which ADL's annual audit of anti-Semitic incidents revealed a dramatic increase in anti-Semitic violence nationwide, ADL developed a program designed to counteract anti-Semitic and racist hatred and violence. Media exposure, education, and more effective law enforcement are important features of the campaign. The cornerstone of ADL's program, however, is the staunch support of legislation providing enhanced penalties for certain crimes when they are committed by reason of the victim's actual or perceived race, religion, sexual orientation, or national origin. ADL has a keen interest in *State v. Mitchell*, Case No. 92-515, because the statute set aside by the Supreme Court of Wisconsin was based on a model bill drafted by ADL's Legal Affairs Department and first published by ADL in 1981.[1]

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[1] ADL's Model Bill as revised in 1988 provides as follows:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ___ of the Penal Code (insert code provision

The *Mitchell* decision, which improperly relies upon *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S. Ct. 2538 (1992), has cast doubt, not only on similar penalty enhancement statutes now in effect in 25 other states and the District of Columbia, but also on proposed federal hate crime legislation presently under consideration in Congress. ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty enhancement hate crime legislation, in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin law.

B. Additional Amici Curiae

The following organizations, listed alphabetically, join the ADL as *Amici Curiae* in urging the Court to reverse the decision by the Wisconsin Supreme Court in *Mitchell*. The interests of each such organization in this case are provided in Appendices A - O hereto:

Appendix	Organization
A	People for the American Way
B	The American Jewish Congress
C	The Center for Constitutional Rights
D	The Center for Women Policy Studies
E	The Fraternal Order of Police
F	The Human Rights Campaign Fund

for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a ___ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

As explained further herein, in order to ensure that ADL's Model Bill did not run afoul of the First Amendment, ADL utilized language from various civil rights statutes which had been upheld as constitutional.

G	The International Association of Chiefs of Police
H	The National Council of Jewish Women
I	The National Gay and Lesbian Task Force
J	The National Institute Against Prejudice & Violence
K	The National Jewish Community Relations Advisory Council
L	The National Organization of Black Law Enforcement Executives
M	The Police Executive Research Forum
N	The Southern Poverty Law Center
O	The Union of American Hebrew Congregations

SUMMARY OF THE ARGUMENT

The Court's decision in this case will affect much more than § 939.645 of the Wisconsin laws. Forty six states have now enacted some form of hate crime legislation, more than half of them based upon the penalty enhancement approach employed in the Wisconsin law.[2] Proposed federal penalty enhancement legislation is also under consideration in Congress.

Through these laws, legislatures throughout the country are attempting to address a serious and growing problem. The potential impact on society of bias-motivated crimes at large is grave. These crimes tear at the fragile bonds that hold together America's diverse and pluralistic society. They heighten tension, anxiety and feelings of helplessness in entire communities. Recent events in Los Angeles and other cities dramatically illustrate the potential for individual incidents to erupt into widespread disturbances and riots.

Each of the *Amici* is unyielding in its commitment to the First Amendment; each is acutely aware that the war

[2] Appendix P hereto itemizes for the Court's convenience citations to the 26 state statutes based on the penalty enhancement approach.

against racial hatred and religious intolerance must be waged in a manner that neither threatens nor impinges upon First Amendment freedoms. *Amici* firmly believe, however, that the penalty enhancement law at issue in this case addresses the problem in a manner that comports fully with the Constitution.

The Wisconsin law punishes a particularly heinous type of conduct; it does not punish thoughts or speech. In structure and in effect, the Wisconsin statute is no different from other antidiscrimination laws, the constitutionality of which have been repeatedly upheld. To the extent that motive plays a part in the penalty enhancement process, the Wisconsin law is no different from longstanding state laws and procedures (and the federal Sentencing Guidelines) under which motive is an important and well established aggravating or mitigating factor in sentencing. Properly construed and applied, the Wisconsin law does not create any "chilling effect."

ARGUMENT

I. HATE CRIMES ARE A NATIONAL PROBLEM

In a suburb of Washington, D.C., two white men assault a black woman walking toward a shopping mall, rip off her clothes, douse her with lighter fluid and, yelling "nigger," threaten to set her on fire.[3] In the Crown Heights neighborhood of Brooklyn, New York, a mob's cries of "Kill the Jew" echo through the streets before a 29-year-old Jewish scholar is stabbed to death.[4] In Kentucky, a group of assailants beat a young gay man with a tire iron and lock him in a car trunk full of snapping turtles, leaving

[3] Twomey, Steve, *A Night of Hate in Wheaton*, Washington Post, March 5, 1992.

[4] On the night of August 19, 1991, following the tragic accidental death of a black child in an automobile mishap, a group of young rioters stabbed Yankel Rosenbaum, who died later in a local hospital.

him with severe brain damage.[5] A riot erupts in Los Angeles, California after four white police officers are acquitted of illegally beating a black motorist, and, in the midst of the chaos, a group of black rioters pulls a white motorist from his truck and viciously beats him. A young black man is struck by a car and murdered after a gang of young white men chase him onto a highway in a Queens, New York neighborhood called Howard Beach.

Like a recurring nightmare, Americans in every part of the country have awakened to these and a host of similar headlines in the past few years. And unfortunately, the racial, ethnic and anti-homosexual motivated crimes that make the headlines are but the tip of the iceberg of a national problem. Less publicized are the thousands of less sensational incidents of assault, battery, threats and vandalism prompted by the same animus.

A. The Scope of the Problem

ADL has been closely tracking one type of bias-motivated incident—anti-Semitic violence and vandalism—since 1960. ADL began publishing in 1979 an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. The Audits conducted over the first three years revealed a substantial increase in anti-Semitic vandalism and violence. From 1982 to 1986, ADL's Audits revealed a general downward trend in such incidents. Suddenly, in 1987, the number of anti-Semitic incidents began to spiral upward. There was a 17% increase in anti-Semitic incidents in 1987 over 1986. For the next five years, the upward spiral continued, culminating in 1991 with the highest total ever reported to ADL—1,879 separate incidents of anti-Semitic violence, vandalism and harassment reported from 42 states and the District of Columbia.

[5] Peirce, Neal R., *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States.

The reported incidents included several fire-bomb and arson attacks on synagogues in California, Jewish cemetery desecrations in nine states and hundreds of assaults throughout the country. Most disturbing was the fact that for the first time since the Audits began, there were more attacks on Jewish individuals than against synagogues and property. The number of physical assaults in 1991 was double the number reported in 1990.

Hate crimes focused on other minorities are also on the rise. Recently, the United States Conference of Mayors sent a survey on hate crimes to over 1,000 cities. Between 1990 and 1991, incidents of hate violence increased in 36% of the responding cities and remained the same in 58%. Only 6% of the responding cities reported a decrease.[6] Data collected pursuant to various states' hate crime reporting regulations indicate a dramatic increase in hate crimes between 1990 and 1991 in Connecticut, Massachusetts and New Jersey, with Florida also reporting a rise. *Amicus Curiae* the National Gay and Lesbian Task Force reported 7,031 incidents of anti-homosexual violence in 1989.[7] A recent report revealed a 31% increase in attacks on gay and lesbian individuals in each of five major metropolitan areas in 1991 over 1990.

Recently, the FBI published the first data compiled pursuant to the federal Hate Crimes Statistics Act of 1990. Despite the fact that only 32 states supplied information, a total of 4,558 hate crime incidents were reported by nearly 3,000 law enforcement agencies to have taken place in 1991. Racial bias was by far the most frequent motive

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[6] *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities*, United States Conference of Mayors, Anti-Defamation League, June 1992.

[7] *Anti-Violence Project, National Gay and Lesbian Task Force, Anti-Gay Violence, Victimization and Defamation in 1989* (1990). See also, Note, *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1541-42 (1989).

(60%) of the reported offenses, followed by religious bias, ethnic bias and sexual-orientation bias.[8]

B. The Severity and Community Impact of Bias-Motivated Crimes

The conduct targeted by the legislation at issue in *Mitchell* is distinct from other criminal behavior. These are not incidents where a victim is coincidentally the member of a group different from the criminal's, or where the criminal—in the course of a burglary or a mugging—realizes his victim's status and utters a racist or anti-Semitic remark. These crimes occur *because* of the victim's actual or perceived status; where race, religion, ethnicity or sexual orientation is the *reason* for the crime. In the vast majority of these cases, but for this personal characteristic, no crime would occur.

Research on bias-motivated crimes is in its infancy, but the available evidence indicates that these crimes are generally much more violent and have a significantly greater community impact than other crimes. One researcher, for example, analyzed 452 hate crime cases in Boston during the period between 1983 and 1987 (the "McDevitt Study").[9] The data revealed that 74% of bias-motivated assault incidents (including assault and battery and assault with a dangerous weapon) involved some physical injury to the victim. The national figure for all assault cases was 29% (Bureau of Justice Statistics, 1985). Remarkably, these bias-motivated assault incidents involved hospitalization of their victims over four times more often than is the case with other assaults.[10]

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[8] Federal Bureau of Investigation Press Release, January 5, 1993.

[9] McDevitt, Jack, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983 - 1987)*, Center for Applied Social Research, Northeastern University (1989).

[10] *Id.* at 7.

Amicus Curiae the National Institute Against Prejudice and Violence conducted in 1989, the first national study of the prevalence and impact of psychological and physical violence motivated by prejudice ("ethnoviolence") in the general population. The findings of this study, based upon telephone interviews completed with 2,078 people in a stratified random sample of the contiguous United States, showed that at least 7% of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. Victims of ethnoviolence suffered, on average, 21% more of the standard psychophysiological symptoms of stress than did victims of similar acts of ordinary violence or abuse.

The impact of bias-motivated crimes on the larger community is grave. These crimes not only heighten the general feeling of vulnerability, but also directly intimidate the entire segment of the community with which the victim is identified, making large sections of the population feel unprotected by the law. These crimes cleave at the delicate bonds that hold together America's diverse communities, provoke retaliation and lawlessness, and perpetuate a cycle of fear and mistrust between these communities. As Justice Stevens notes in his concurring opinion in *R.A.V.*:

> One need look no further than the recent social unrest in the Nation's cities to see that race-based threats cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order.

112 S.Ct. at 2570, n. 9.

II. PENALTY ENHANCEMENT LEGISLATION IS AN ESSENTIAL WEAPON IN THE FIGHT AGAINST BIAS-MOTIVATED VIOLENCE

Clearly, hatred cannot be legislated out of existence. The long term solution to bigotry is education and experience. Without a doubt, however, legislation that increases the penalty for bias-motivated crimes has been a powerful tool in the nationwide campaign against hate violence and vandalism.

First, the penalty enhancement concept allows society to redress a unique type of wrongful conduct in a manner that reflects that conduct's seriousness. Bias-motivated crimes have a more serious potential impact on the wider community than do other crimes. It is within the power of government to give such crimes the special treatment that they deserve. This Court has noted with approval the theory in criminal sentencing that "the punishment should fit the crime" and that "the true measure of crimes is the injury done to society." *See Payne v. Tennessee*, __ U.S. ___, 111 S.Ct. 2597, 2605 (1991). As the Supreme Court of Oregon aptly explained in its recent decision upholding the Oregon hate crime law and specifically disagreeing with *Mitchell*,

> Such [bias motivated] crimes—because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member—invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived

> to be possessed by the victim, that have historically been targeted for wrongs. *Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.*

State v. Plowman, 838 P.2d 558, 563 (1992) (emphasis added).

Second, the Wisconsin statute and similar statutes also ensure that targeted groups perceive that law enforcement officials take their concerns seriously. By enforcing these laws, an isolated incident is less likely to create anxiety in the wider community; the potential for an incident to erupt into a widespread disturbance is minimized.

Third, law enforcement authorities believe these laws can have a deterrent effect by making clear that hate crimes will be considered particularly serious crimes and will be dealt with accordingly. While there have been no empirical studies on the point, law enforcement officials have recognized the potential deterrent effect of hate crime laws. For example, when it became apparent that large segments of the population mistakenly believed that the Court's decision in *R.A.V.* vitiated all hate crime laws, Chicago's Police Superintendent, the United States Attorney, the Cook County State's Attorney and several other Chicago law enforcement officials considered it necessary to hold a rare and widely publicized press conference to underscore the fact that there was no "window of opportunity" for bigots.[11]

For these reasons, there is no question that the State of Wisconsin has legitimate and compelling bases for the enactment and prosecution of its penalty enhancement law.

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[11] Sandberg, Michael A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5.

III. THE WISCONSIN LAW COMPORTS WITH THE FIRST AMENDMENT

At the time of Mitchell's crimes, the Wisconsin law provided for penalty enhancement if the defendant committed one of several enumerated offenses and "intentionally select[ed] the person against whom the crime" was committed or "select[ed] the property which [was] damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." § 939.645 (Wisc. Stats.) The Wisconsin Supreme Court held the statute to be unconstitutional on two grounds: First, the "statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." Second, it "violates the First Amendment indirectly by chilling free speech." *State v. Mitchell*, 485 N.W.2d 807, 811 (1992). The Wisconsin Court is wrong on both counts.

A. THE WISCONSIN LAW DOES NOT PUNISH THOUGHTS OR SPEECH; IT PUNISHES THE ACT OF INTENTIONAL SELECTION BECAUSE OF THE VICTIM'S STATUS.

According to the Wisconsin Supreme Court, the Wisconsin statute punishes "thought" because it "punishes the 'because of' aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection." *Id.* at 812. This is because "an examination of the intentional 'selection' of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." *Id.* at 813.

As is discussed further below, to the extent that the offender's "motive" or "purpose" is relevant to the inquiry, the Wisconsin statute is typical of many state laws and procedures. Also, under the federal Sentencing Guidelines, "motive" or "purpose" are legitimate, significant

and well established aggravating or mitigating factors in determining a defendant's appropriate punishment. The principal flaw in the Wisconsin Court's analysis, however, is its assumption that the punishment of an act prompted by certain thoughts is punishment of the thoughts themselves. As Justice Bablitch explains in his dissent,

> The penalty enhancement statute is directed at the action or conduct of selecting a victim .... The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive. ... The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

Mitchell, 485 N.W.2d at 821 - 822 (Bablitch, J., dissenting).

A New York court reached the same conclusion in upholding New York's penalty enhancement law:

> The statute does not attempt to prohibit bigotry itself. The individual's freedom to think, and indeed, speak, publish or broadcast views on the subjects of race, religion or ethnicity are not regulated by this law. Violent conduct is what is being regulated.

People v. Grupe, 532 N.Y.S.2d 815, 818 (N.Y.City Crim.Ct.1988). *See also People v. Miccio*, 589 N.Y.S.2d 762 (N.Y.City Crim.Ct. 1992) (distinguishing New York penalty enhancement law from St. Paul ordinance invalidated in *R.A.V.*).

While the right to think, believe and speak one's thoughts is at the core of the First Amendment, *actions* based on these beliefs have never been accorded the same range of protection from government regulation. As this Court recently emphasized in *R.A.V.*:

> Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 112 S.Ct. at 2546-47. It has never seriously been questioned that the First Amendment does not prohibit laws which proscribe violent conduct even if such conduct is directly based upon a philosophy, religion or set of abstract beliefs. "Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

Nowhere is the flawed reasoning of the *Mitchell* opinion more apparent than in the Wisconsin Court's strained and confusing effort to distinguish the Wisconsin law from other antidiscrimination laws. The Wisconsin Court asserts that "under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the 'selection' which is punished is not an act, it is a mental process." *Mitchell*, 485 N.W.2d at 816. According to the Wisconsin Court, while antidiscrimination laws involve "objective acts of discrimination," the penalty is enhanced under the Wisconsin hate crimes statute "because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act." *Id.* at 817.

This reasoning makes no sense. It certainly is an insufficient basis to set aside a law of such urgency and importance. If the Wisconsin statute is unconstitutional, then the nation's body of other antidiscrimination laws are also constitutionally suspect. In virtually all of the federal antidiscrimination laws, the prohibited action is the *selection* of a person or group for differential treatment "because of" his or her status. In language, structure and application, the Wisconsin law and most of the nation's

antidiscrimination laws are completely analogous.[12] Under the Wisconsin law, the penalty is enhanced where the victim is intentionally selected "*because of*" his or her race, religion, color, disability, sexual orientation, national origin or ancestry. Similarly, Title VII, as amended by § 2000e-2(a)(1), prohibits various employment actions "*because of*" the employee or prospective employee's race, color, religion, sex or national origin. 42 U.S.C. § 3604 prohibits interference with housing choices "*because of* [the victim's] race, color," or other listed status.[13] Under the Wisconsin penalty enhancement law and these antidiscrimination laws, it is the act of discrimination that is proscribed. As Justice Bablitch notes in his dissent, "both sets of laws involve discrimination, both involve victims, both involve action 'because of' the victim's status."

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?[14]

Mitchell, 485 N.W.2d at 820 (Bablitch, J., dissenting).

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[12] Indeed, ADL's Legal Affairs Department employed the language and structure of federal and state antidiscrimination laws in drafting in 1981 the Model Bill upon which the Wisconsin law is based.

[13] The constitutionality of antidiscrimination laws has repeatedly been upheld. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activity that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"). *See also Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

[14] Similarly, in his testimony before the House Subcommittee on Crime and Criminal Justice (during its consideration of the constitutionality of the proposed House Bill on hate crimes), Professor Laurence Tribe noted: "If *R.A.V.* were to cast a constitutional shadow over the Hate Crimes Sentencing Enhancement Act, precisely the same shadow would befall this entire corpus of antidiscrimination law."

In a footnote, the Wisconsin Court hints that it believes there were two other "distinctions" between the Wisconsin penalty enhancement law and other antidiscrimination laws:

> We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

Mitchell, 485 N.W.2d at 817, n. 21

This reasoning is doubly wrong. Penalty enhancement hate crime legislation is no more concerned with motive and no less concerned with conduct than other antidiscrimination laws.[15] And to rest so important a point on a presumed distinction between "redressing" and "punishing" begs the question. "Punishment" *is* a form of "redressing;" to say that it is permissible to consider motive when "redressing" conduct, but impermissible where society "punishes" for the same conduct is word play. It is also incorrect, for criminal penalties *do* attach to certain antidiscrimination law violations. *See e.g.*, 18 U.S.C. § 242 ("Whoever, under color of any law, . . . willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution . . . on account of such inhabitant being an alien, or by reason of his color, or race . . . shall be

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[15] Indeed, "motive," as such, is an *explicit* element in certain antidiscrimination offenses. Title VII, for example, provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m) (emphasis added). *See also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3) requires "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action").

fined not more than $1,000 or imprisoned not more than one year, or both . . .").[16]

In sum, under the penalty enhancement approach, it is criminal conduct that is sought to be "suppressed," not the ideas or philosophies that prompt hate crimes or the utterances that may accompany such crimes. As the Court acknowledged in *R.A.V.*, "We have long held . . . that [even] nonverbal expressive activity can be banned because of the action it entails . . . ." *R.A.V.*, 112 S. Ct. at 2544.

B. THE FIRST AMENDMENT DOES NOT PROHIBIT THE ENHANCEMENT OF PUNISHMENT BECAUSE OF A BIAS MOTIVE.

While it is the act of intentional selection that is punished under the Wisconsin statute, *Amici* do not contend that the defendant's "motive" or "purpose" is irrelevant to the inquiry. There is little question that prosecutors, in seeking to prove "intentional selection" of the victim because of his or her status under the Wisconsin law and similar statutes, may introduce evidence regarding the defendant's motives. The Wisconsin Court thinks that this

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[16] It should be noted that numerous other state and federal criminal laws provide for penalty enhancement depending upon the victim's special status. In Wisconsin, for example, there is penalty enhancement if the victim of a battery is over 61 years of age or is disabled. § 940.19 (Wisc. Stats.) Although the analogy between these laws and the Wisconsin hate crimes statute is not as close as that between the antidiscrimination laws and the Wisconsin statute, they demonstrate that criminal penalties are often enhanced where a crime involves certain types or categories of victims, even if the victim is intentionally selected because of a belief or a philosophy which itself is protected by the First Amendment. A Presidential assassin would be subject to the enhanced penalties provided under 18 U.S.C. § 1751 (Presidential and Presidential staff assassination, kidnapping and assault) whether or not he selected his victim as a result of a political philosophy or set of purely abstract beliefs. As Justice Abrahamson notes in her dissent in the *Mitchell* case, "The state has legitimate, reasonable and neutral justifications for selective protection of certain people." 485 N.W.2d at 818.

not only violates the First Amendment, but that it is also anathema to basic principles of criminal law. The Wisconsin Court asserts that "because all of the crimes [for which penalties are enhanced] are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights." *Mitchell*, 485 N.W.2d at 812. In admonishing that "intent and motive should not be confused," the Wisconsin Court makes the startling assertion that, "[c]riminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so." *Id.*

This is simply not so. Criminal law is intimately concerned with "motives" and with "a person's reasons for committing crimes." It must not be forgotten that the Wisconsin statute is a penalty enhancement statute. In enacting the law, the Wisconsin legislature merely provided that *sentences* and other *punishment* for certain crimes can be increased because of intentional selection of certain victims. This Court recently emphasized that "the sentencing authority has always been free to consider a wide range of relevant material." *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992), *quoting Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991). *See also United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"). It is hornbook law that "motives," as such, play a crucial role in determining sentences and the appropriate punishment in criminal cases:

> Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good mo-

> tives, or a rather high sentence because of his bad motives.[17]

One need look no further than the federal Sentencing Guidelines to appreciate the pivotal role of "motive" in sentencing. For example, under § 2A2.2(b)(4) ("Aggravated Assault"), the sentence is increased by two levels if an "assault was *motivated* by a payment or offer of money or other thing of value" (emphasis added). Under § 2G3.1 ("Importing, Mailing, or Transporting Obscene Matter"), the base level is increased "if the offense involved an act related to distribution *for pecuniary gain*." (emphasis added). Under § 2Q2.2 ("Lacey Act: Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants"), the base level is increased by two levels "if the offense involved *a commercial purpose*." (emphasis added). These and other provisions of the Sentencing Guidelines are "penalty enhancement" provisions based upon the defendant's "motives."

Moreover, the Wisconsin Court, and the article upon which it bases its discussion of "intent," "motive" and "purpose,"[18] are mistaken that "motive cannot be a criminal offense or an element of an offense." *Mitchell*, 485 N.W.2d at 813, n. 11. There are, in fact, many crimes in which "motive" is an element of the offense. As one commentator explains:

> If a legislature wishes to treat in a special way acts done from a particular motive, it may incorporate the motive in the definition of the offense by a special use of the term *intent*. If murder for money or for vengeance is to be sin-

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[17] LeFave, Wayne R., Scott, Austin, W., *Criminal Law* (2d Ed. 1986) at 231.

[18] Gellman, Susan, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 331 (1991).

> gled out, the proscribed act may be "causing the death of a person with intent to profit financially thereby" or "with intent to avenge the death of another." Here the phrase "with intent to" signals the pursuit of an interest as the purpose of the act. It designates a *motive* rather than a *harm* as a required element of the crime, and so the phrase is used in a different way than when specific intent is designated.[19]

The Wisconsin Court seems troubled by the fact that the penalty enhancement is embodied in legislation rather than left to the discretion of the judge: "Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." *Mitchell*, 485 N.W. 2d. at 815, n. 17.

The Wisconsin Court clearly misreads the Wisconsin law. The section of the Wisconsin statute under which Mitchell was sentenced gives the judge complete discretion on whether the penalty should be enhanced and, if so, by how much (up to the maximum). Section 939.645(2)(c) of the Wisconsin laws provides that if the crime is a felony, "the maximum prescribed by law for the crime *may* be increased by not more than $5,000 and the maximum period

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[19] Gross, Hyman, *A Theory of Criminal Justice* (1st Ed. 1979) at 112. As an example of "the two different uses of intent" (*i.e.*, as "motive" and as "specific intent"), Professor Gross cites to the New York Penal Law definition of kidnapping in the first degree. "That offense is constituted by abducting another person when (among other things) the abductor's intent is to compel payment of a ransom by a third person; or when the abductor's intent is to inflict physical injury on, or sexually abuse, the victim. It seems clear that the first of these alternative intent requirements is not a specification of harm but of *motive*." (emphasis added).

of imprisonment prescribed by law for the crime *may* be increased by not more than 5 years." (emphasis added).

Further, since the end result of both a judge-imposed and a legislature-imposed penalty for a hate crime is an enhanced sentence, the Wisconsin Court's argument is a distinction without a difference. Effectively, the Wisconsin legislature increased the maximum punishment for each of the underlying felonies by 5 years, but provided that the offender shall not be sentenced for any portion of the upper 5 years of the maximum period unless the victim was intentionally selected because of his or her race, religion, color, disability, sexual orientation, national origin or ancestry. As this Court acknowledged in *Mistretta v. United States*, 488 U.S. 361, 364 (1989), "historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government. Congress, of course, has the power to fix the sentence for a federal crime, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control." There is simply no constitutional infirmity in including in a statute a penalty enhancer based on a particular motive.

The question, then, is not whether the Wisconsin statute is unconstitutional because it enhances penalties based on "motives" *per se*, but whether it is unconstitutional in enhancing punishments based on the offender's bias motive—his or her intentional selection of the victim because of some animus tied to the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. This Court has already twice answered that question in the negative. In *Barclay v. Florida*, 463 U.S. 939 (1983), the defendant set out to kill white persons indiscriminately in order to start a race war, and murdered a white hitchhiker. In imposing the death sentence, the trial court discussed (among other aggravating factors) the racial motive

for the murder. This Court rejected the argument that it was improper to take into account the defendant's racial motive in imposing capital punishment. *Id.* at 950.

The Court returned to the same point more recently in *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992). At sentencing, the trial judge admitted evidence that the defendant was a member of the Aryan Brotherhood, a prison gang with white supremacist beliefs, and the jury recommended the death penalty. This Court reversed the lower court's imposition of the death sentence because any racists beliefs that the Aryan Brotherhood might hold could not be tied in any way to the murder (Dawson and his victim were both white). The evidence thus proved only Dawson's abstract beliefs, and was not a proper aggravating factor. The Court made clear, however, that had Dawson's racist beliefs motivated or prompted the murder, the admission of evidence regarding those beliefs would *not* constitute a First Amendment violation:

> [T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Id. at 1097.

The Court specifically reaffirmed the holding in *Barclay* that evidence of a defendant's beliefs and associations, including racist beliefs and associations, can be relevant and admissible in sentencing, so long as such evidence is tied in some way to the subject crime. *Id.* at 1098.

In sum, the conclusion reached by the Wisconsin Court regarding the role of "motives" in criminal law is clearly incorrect. The First Amendment does not prohibit the enhancement of punishment because of a bias motive.

C. PROPERLY CONSTRUED AND APPLIED, THE WISCONSIN LAW HAS NO "CHILLING EFFECT"

As noted above, the Wisconsin Court's second ground for setting aside the Wisconsin law was its presumed "chilling effect." As the Wisconsin Court explains:

> [O]f course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech.

Mitchell, 485 N.W.2d at 816.

This at best merely exaggerates what may occur if the Wisconsin statute is misapplied or misinterpreted. The argument disintegrates into senseless hyperbole when the Wisconsin Court quotes Ms. Gellman's article (*See* n. 18 above): "Anyone charged with one of the underlying offenses could . . . face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas . . . ." *Id.* at 816, *quoting* Gellman, 39 U.C.L.A. L. Rev. at 360.

The Wisconsin penalty enhancement law will not lead to self-censorship, habitual or otherwise; there will be no detrimental effect on either the marketplace of ideas or the nation's considerable body of ethnic jokes. A statute is unconstitutionally overbroad if it sweeps protected First Amendment speech within its reach and thereby chills free speech. *See, e.g., Gooding, Warden* v. *Wilson*, 405 U.S. 518, 522 (1972); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). The notion that bigots and racists will refrain from exercising their First Amendment rights because some day, if they commit a crime, their penalty may be enhanced,

is simply absurd. Moreover, there are several safeguards which ensure that, if the statute is properly applied and interpreted, defendants will not be punished for holding or expressing unpopular or offensive beliefs and will *only* be punished if they *intentionally select* their victims because of their victims' status.

First, a defendant for whom the prosecutor seeks an enhanced penalty is afforded far greater procedural safeguards under the Wisconsin law than without it. As discussed above, in the typical sentencing hearing, the rules of evidence are relaxed and the judge is allowed to consider a wide variety of factors bearing on the defendant's motives and character. Under *Dawson* and *Barclay*, bias motive can be introduced if it is tied to the crime. Under the Wisconsin law, however, the penalty can only be enhanced if the "intentional selection" of the victim "because of" his or her status is proven to the trier of fact *beyond a reasonable doubt*. Indeed, the Wisconsin statute requires the court to direct that the trier of fact find a *special verdict* as to whether the victim was intentionally selected because of one of the listed characteristics. § 939.645(3) (Wisc. Stats.).

Further, the Wisconsin Court fails to appreciate that the "beyond a reasonable doubt" evidentiary standard, combined with the requirement that the victim be selected "*because of*" his or her status, provides a potent safeguard against both the introduction of non-probative evidence and the possibility of punishment for holding offensive or unpopular beliefs. To satisfy the requirements of the statute (and the holding in *Dawson*), there must, in short, be a "tight nexus" between the evidence and the crime. Such evidence must be part of the chain of cause and effect leading to the crime, and is typically contemporaneous with the crime. The *Barclay* case, in which the defendant's membership—at the time the murder was committed—in a group whose avowed purpose was to kill white persons in order to start a revolution and a race war, is an example

of the type of nexus that is required. Justice Abrahamson, in her dissent in *Mitchell*, makes this point:

> In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. . . . . The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime. Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Mitchell, 485 N.W.2d at 818 - 19 (Abrahamson, J., dissenting).

Moreover, the relevancy rules referred to by the Wisconsin Court are extremely important additional safeguards that must be taken into account. For example, § 904.03 (Wisc. Stats.) provides for the exclusion of evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Section 904.04(c) (Wisc. Stats.) bars the introduction of evidence of a person's character or traits to prove action in conformity therewith on a particular occasion.[20] As Justice Abrahamson observes:

> To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a

[20] *See also* Federal Rules of Evidence 403 and 404.

> person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime.

Mitchell, 485 N.W.2d at 819 (Abrahamson, J., dissenting).

There is no question that speech evincing a proscribed intent or motive can be introduced to prove the existence of proscribed conduct. *See, e.g., Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965). For example, in antidiscrimination cases, impermissible motives are often proven by the defendant's statements. *See, e.g., Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (in proving a violation of Title VII, "stereotyped remarks can certainly be evidence that gender played a part" in a particular employment decision).[21]

The Wisconsin penalty enhancement statute is clearly not unconstitutional on its face. As to the possibility that it may be misapplied, there are potent safeguards which help ensure it will be applied in a manner consistent with First Amendment values and concerns. Further, the argument that courts may misapply the statute is simply insufficient:

> It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1983).

[21] *See also Milligan-Jensen* v. *Michigan Technological Univ.*, 767 F. Supp. 1403, 1413 (W.D. Mich. 1991) (defendant employer's remark that "you have the lady's job" is "the clearest direct evidence of [employer's] discriminatory intent").

Amici submit that any close examination of the Wisconsin statute and similar penalty enhancement laws will establish that "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. The governmental interest in enacting these crimes is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).[22] The law does not punish "speakers who express views on disfavored subjects," *R.A.V.*, or attempt to "drive certain ideas or viewpoints from the marketplace." *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, __ U.S. __, 112 S. Ct. 501, 508 (1991).

The defendant in this case suffered no deprivation of his First Amendment rights. The Wisconsin law, and similar penalty enhancement statutes based on ADL's Model Bill, leave racists and bigots free to think, speak, believe and express their views within the full range of permitted conduct under the First Amendment.[23]

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[22] Indeed, given the type of underlying crimes that must be committed to trigger the statute, it is unlikely that cases prosecuted under the Wisconsin penalty enhancement law will involve any expressive activity at all. This is in marked contrast to statutes like the flag-burning law invalidated in *United States v. Eichman*, 496 U.S. 310 (1990).

[23] In his concurrence in *O'Brien*, Justice Harlan observed that ultimately, the test under the First Amendment of a government regulation which may incidentally restrict expression but which furthers important governmental interests (and satisfies the Court's other criteria) is whether the regulation "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *O'Brien*, 391 U.S. at 388-89.

CONCLUSION

For the above reasons, *Amici Curiae* urge the Court to reverse the decision of the Supreme Court of Wisconsin and affirm the constitutionality of the Wisconsin law.

Respectfully submitted,

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APPENDIX

APPENDIX A:

PEOPLE FOR THE AMERICAN WAY

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil liberties and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 300,000 members nationwide. People For has a broad concern for protecting First Amendment rights, and has submitted *amicus* briefs to this Court in support of free expression in a number of recent cases, such as *Forsyth County* v. *Nationalist Movement* and *United States* v. *Eichman*.

At the same time, the organization is devoted to promoting religious and racial tolerance and pluralism and to combating discrimination and prejudice. People For believes that the law at issue in this case is consistent with both these sets of objectives and represents a method of state regulation of discriminatory conduct, similar to numerous other antidiscrimination laws, which can be properly applied in a manner that fully comports with the First Amendment.

APPENDIX B:

THE AMERICAN JEWISH CONGRESS

The American Jewish Congress is an organization founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has long supported the use of the law, including the criminal law, to punish those who would discriminate against American citizens because of their race, religion, sex, sexual orientation, or national origin. Crimes in which the victim is selected because of these suspect grounds tear at the fabric of society. Such offenders must be treated and punished with utmost seriousness.

Because Wisconsin's penalty enhancement law is an important weapon in the war against violent bigotry, the American Jewish Congress joins in this brief.

APPENDIX C:

THE CENTER FOR CONSTITUTIONAL RIGHTS

The Center for Constitutional Rights (CCR) was created in 1966 by lawyers who were active in the civil rights movement. Through litigation and public education, CCR has continued to work to make meaningful constitutional, statutory, and international human rights. Among its cases, CCR has defended the First Amendment; fought bias-related violence by organized hate groups, individuals, or police; and supported hate crime legislation designed to protect people of color, religious minorities, women, Lesbians and Gay men, the differently abled and other marginalized groups targeted for violence.

The Center for Constitutional Rights joins with *Amici* to urge the Court to uphold the constitutionality of the Wisconsin hate crime legislation, which represents the attempts of local governments nationwide to oppose escalating violence against historically oppressed groups. If the Court fails to uphold this statute, which threatens no constitutionally protected expression, it will send the dangerous message that this society will tolerate bias-motivated brutality and it will signal a retreat from long-established legal and moral principles opposing discrimination. While the facts of this care are historically and currently atypical, the Court must take this opportunity to affirm a constitutionally sound and vitally necessary method of combatting the devastating harm and terror of bias-motivated crimes.

APPENDIX D:

THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies (the "CWPS") was established in 1972 as the first independent national public policy research and advocacy institute focused specifically on improving the social, legal, and economic status of women. Underlying all of the Center's work is the premise that sexism and racism must be addressed simultaneously. The Center looks at the impact of combined race-plus-sex bias on women of color, women from diverse socioeconomic backgrounds, women of diverse sexual identities, women with disabilities, and women of different ages. In 1991 the Center published a policy paper, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, and participated in coalitions and task forces on hate crimes and the Violence Against Women Act. In September, 1992 the CWPS convened a "Think Tank" to consider the efficacy and legitimacy of defining civil rights remedies for acts of hate violence against women. Based on our concern and interest for individual rights we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin law.

APPENDIX E:

THE FRATERNAL ORDER OF POLICE

The Fraternal Order of Police (FOP) is the nation's largest law enforcement organization; with over 240,000 members throughout the United States. Founded in 1915, the FOP represents professional, full-time officers from all agencies of law enforcement on the federal, state and local levels.

Through the years, the FOP has developed a proud tradition of leadership in national affairs and has a history of commitment to insuring that society as a whole is equally protected under the law.

The FOP believes that hate crimes deprive society of this equal treatment under the law and the nation's law enforcement has more than a mere duty to respond against this bias.

Assisting law enforcement in their endeavor to insure equal treatment under the law are statutes in certain states (31) that provide for penalty enhancement for violations of hate crimes laws. The FOP also believes these penalty enhancement statutes also serve as a deterrent to would-be violators.

The FOP believes that the question raised by the ruling in *State* v. *Mitchell* threatens the effective policing of hate crimes which is so important to the order of this nation.

APPENDIX F:

THE HUMAN RIGHTS CAMPAIGN FUND

The Human Rights Campaign Fund is the largest political organization representing gay and lesbian Americans. Hate crimes motivated by the sexual orientation of the victim are on the rise in many major American cities, and the National Institute of Justice has estimated that crimes against gay and lesbian Americans may be the largest category of hate crimes. The Human Rights Campaign Fund and the Americans it represents believe that government must have the tools, such as the law at issue in this case, to deal effectively with this growing problem.

APPENDIX G:

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

The International Association of Chiefs of Police (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its program of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

APPENDIX H:

THE NATIONAL COUNCIL OF JEWISH WOMEN

Founded in 1893, the National Council of Jewish Women ("NCJW") is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our "National Resolutions," which include working for "the enactment and enforcement of laws and regulations which protect individual rights and civil liberties", we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX I:

THE NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force ("NGLTF") is the oldest national gay and lesbian civil rights advocacy organization in the U.S. Since 1973, NGLTF has worked to eradicate prejudice, discrimination and violence based on sexual orientation and HIV status. Since 1984, NGLTF has noted in its annual audit of anti-lesbian and anti-gay incidents a steady rise in defamation, harassment, violence and attacks. NGLTF supports hate crimes penalty enhancement legislation as part of the overall effort to count and counter crimes which target individuals on the basis of their race, religion, creed, color, sex, national origin or sexual orientation.

NGLTF balances its interest in countering violence against lesbians and gay men with its interest in protecting First Amendment rights. NGLTF has been at the forefront of the fight to support the right of lesbians and gay men to speak their minds and publish their ideas. Indeed, NGLTF is acutely aware that bias violence abridges the First Amendment rights of its victims by making them afraid to assemble and organize.

It is out of these dual interests that NGLTF joins ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX J:

THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

The National Institute Against Prejudice & Violence ("NIAPV"), created in 1984, is the only national center dedicated exclusively to studying and responding to ethnoviolence—psychological and physical violence motivated by race, religion, ethnicity, sexual orientation or gender. While other organizations deal with selected aspects of these problems, NIAPV is unique in its comprehensive approach. NIAPV's landmark social science research is the foundation of training and educational programs addressing the causes and effects of ethnoviolent victimization in communities, schools and workplaces; cultural differences that cause intergroup tension; effective communication and conflict resolution; and the development of procedures for reporting and responding to incidents. NIAPV also acts as a clearinghouse of information on reported incidents of intergroup conflict and model programs of response; tracks the quantity and quality of news media activity; publishes reports and educational materials; and works for the enactment of appropriate legislation.

NIAPV's research clearly establishes both the pervasiveness of ethnoviolence as well as the greater traumatic impact of ethnoviolence on the victim. In a 1987 study of a college campus ("The UMBC Study") NIAPV found that 20 percent of all minority students experienced at least one act of ethnoviolence during the academic year studied. Numerous replications of The UMBC Study at campuses around the country, and analysis of other similar campus research, confirm the 20 percent figure as a conservative estimate of the number of minority students nationwide who are victims of ethnoviolence during an academic year. The traumatic effects of the victimization were found to be often serious and long-lasting.

In 1989, pursuant to a grant from the Ford Foundation, NIAPV conducted the first national study of the prevalence and impact of ethnoviolent victimization in the general population ("The National Victimization Survey"). The findings of this study, based upon telephone interviews completed with 2,078 people in a stratified random sample of the contiguous United States, showed that at least 7 percent of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. On a scale of nineteen, standard psychophysiological symptoms of stress, victims of ethnoviolence suffered, on average, 21% more of these symptoms than did victims of similar acts of ordinary violence or abuse (5.8 symptoms versus 4.8). Preliminary findings of a recently-completed study of a large corporate setting, funded by the National Institute of Justice, confirm the earlier studies and indicate that ethnoviolence is even more pervasive in the workplace than in the larger community.

NIAPV's research consistently finds that verbal and symbolic expressions of prejudice cause measurable and substantial trauma to their targets. Still, NIAPV has always held that most such expressions, as odious as they are, must be protected by the First Amendment if freedom of speech is to remain a central value of our society. For example, NIAPV believes that group defamation is protected by the First Amendment; and most face-to-face insults and slurs which do not amount to actual threats of violence or "fighting words" are also protected speech. In such cases it is our responsibility to understand who is paying the price to preserve the freedom of speech and

to take committed action in other areas to ameliorate the harmful effects on its victims.

Millions of Americans know firsthand the vicious harm inflicted by acts of ethnoviolence, and this is reflected in wide and strong support for the many so-called "hate crime" laws which have been enacted in the states. The recent uprisings in Los Angeles and other cities are truly the tip of a large and explosive iceberg of intergroup tensions and conflict. While the law alone cannot begin to solve these problems, nevertheless it has a critical role to play in combatting their most harmful manifestations. NIAPV believes that the ADL model "hate crime" statute represents a responsible and effective effort to combat ethnoviolent crimes while protecting the freedom of speech under the First Amendment.

For the reasons stated above, we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX K:

THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization for Jewish community relations in the United States, and consists of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member agencies representing Jewish communities throughout the United States (listed below).

As the national planning and coordinating body for the field of Jewish community relations, NJCRAC is dedicated to preserving and protecting the principles embodied in the Bill of Rights—particularly the First Amendment—and is equally committed to the counteraction of discrimination and bigotry in the society. The NJCRAC believes that this balancing of sometimes conflicting interests, in the larger context of constitutional protections, is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

NJCRAC Constituent Organizations

National Agencies

American Jewish Committee
American Jewish Congress
B'nai B'rith/Anti-Defamation League
Hadassah
Jewish Labor Committee

Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of Conservative Judaism
Woman's League for Conservative Judaism
Women's American ORT

Community Agencies

Alabama

CRC of the Birmingham Jewish Federation

Arizona

CRC of the Greater Phoenix Jewish Federation
JCRC of the Jewish Federation of Southern Arizona

California

Jewish Federation of Greater Long Beach and West Orange County
CRC of the Jewish Federation-Council of Los Angeles
JCRC of the Greater East Bay
Jewish Federation of Orange County
JCRC of Sacramento
JCRC of United Jewish Federation of San Diego
JCRC of San Francisco, the Peninsula, Marin and Sonoma Counties
JCRC of Greater San Jose

Connecticut

Jewish Federation of Greater Bridgeport
Jewish Federation of Greater Danbury
Jewish Federation of Eastern Connecticut
CRC of Greater Hartford Jewish Federation
Jewish Federation of Greater New Haven
United Jewish Federation of Stanford
Jewish Federation of Waterbury

Delaware

Jewish Federation of Delaware

District of Columbia

Jewish Community Council of Greater Washington

Florida

Jewish Federation of South Broward
Jewish Federation of Fort Lauderdale
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Jewish Federation of Greater Orlando
Jewish Federation of Palm Beach County
Jewish Federation of Pinelas County
Sarasota-Mantes Jewish Federation
South Palm Beach County Jewish Federation

Georgia

Atlanta Jewish Federation
Savannah Jewish Federation

Illinois

JCRC of the Jewish Limited Fund of Metropolitan Chicago
Jewish Federation of Peoria
Springfield Jewish Federation

Indiana

Indianapolis JCRC
Jewish Federation of St. Joseph Valley

Iowa

Jewish Federation of Greater Des Moines

Kansas

(See Missouri)

Kentucky

Central Kentucky Jewish Federation
Jewish Community Federation of Louisville

Louisiana

Jewish Federation of Greater Baton Rouge
Jewish Federation of Greater New Orleans
Shreveport Jewish Federation

Maine

Jewish Federation Community Council of Southern Maine

Maryland

Baltimore Jewish Council

Massachusetts

JCRC of Greater Boston
Jewish Federation of North Shore
Jewish Federation of Greater New Bedford
Jewish Federation of Greater Springfield
Worcester Jewish Federation

Michigan

Jewish Community Council of Metropolitan Detroit
Flint Jewish Federation

Minnesota

JCRC/Anti-Defamation League of Minnesota and the Dakotas

Missouri

Jewish Community Relations Bureau/American Jewish Committee of Greater Kansas City
St. Louis JCRC

Nebraska

ADL/CRC of the Jewish Federation of Omaha

New Jersey

Federation of Jewish Agencies of Atlantic County
United Jewish Community Bergen County/North Hudson

Jewish Federation of Central New Jersey
Jewish Federation of Clinton-Passaic
MetroWest United Jewish Federation
Jewish Federation of Greater Middlesex County
JCRC Jewish Federation of North Jersey
JCRC of Southern New Jersey
Jewish Federation of Mercer and Bucks Counties

New Mexico

Jewish Federation of Greater Albuquerque

New York

Jewish Federation of Broome County
Jewish Federation of Greater Buffalo
Elmira Jewish Welfare Fund Jewish Federation of Greater Kingston
JCRC of New York
United Jewish Federation of Northeastern New York
Jewish Federation of Greater Orange County
Jewish Community Federation of Rochester
Syracuse Jewish Federation
Utica Jewish Federation

Ohio

Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
CRC of the Columbus Jewish Federation
JCRC of the Jewish Federation of Greater Dayton
CRC of the Jewish Federation of Greater Toledo
JCRC of Youngstown Area Jewish Federation

Oklahoma

Jewish Federation of Greater Oklahoma City
Jewish Federation of Tulsa

Oregon

Jewish Federation of Portland

Pennsylvania

CRC of the Jewish Federation of Allentown
Erie Jewish Community Council
CRC of the United Jewish Federation of Greater Harrisburg
JCRC of Greater Philadelphia
CRC of the United Jewish Federation of Pittsburgh
Scranton-Lackawanna Jewish Federation
Jewish Federation of Greater Wilkes-Barre

Rhode Island

CRC of the Jewish Federation of Rhode Island

South Carolina

Charleston Jewish Federation
Columbia Jewish Federation

Tennessee

JCRC of the Memphis Federation Council
Jewish Federation of Nashville and Middle Tennessee

Texas

Jewish Federation of Austin
Jewish Federation of Greater Dallas
JCRC of the Jewish Federation of El Paso
Jewish Federation of Fort Worth and Tarrant County
CRC of the Jewish Federation of Greater Houston
JCRC of the Jewish Federation of San Antonio

Virginia

United Jewish Community of the Virginia Peninsula
Jewish Community Federation of Richmond
United Jewish Federation of Tidewater

Washington

Jewish Federation of Greater Seattle

Wisconsin

Madison Jewish Community Council
Milwaukee Jewish Council

("CRC"—Community Relations Committee or Council; "JCRC"—Jewish Community Relations Council)

APPENDIX L:

THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES

The National Organization Of Black Law Enforcement Executives ("NOBLE") is a non-profit organization of police chiefs, agency heads, command-level law enforcement officials and criminal justice educators whose membership is numbered at approximately 2400. NOBLE's goals are to develop, implement and manage innovative ideas, concepts and programs aimed at reducing violence, crime, and the elimination of racism in the criminal justice arena. NOBLE was founded in September, 1976, during a three day symposium co-sponsored by the Police Foundation and the Law Enforcement Assistance Administration (LEAA).

Consistent with its motto, "Justice by Action," NOBLE aggressively pursues its goals by conducting substantive research, speaking out on the issues and performing a variety of outreach activities. NOBLE's success in this arena is reflected by its growth and the major role it has played, and continues to play, in shaping policy in areas of vital importance to minorities and the law enforcement community. NOBLE has effectively used the judicial process and direct correspondence to express opinions and concerns. NOBLE has endorsed strategies that provide a holistic approach to crime and violence and proactive policy-community involvement.

What has come to be known as hate violence, racial and religious violence and harassment was first researched by NOBLE in 1983. NOBLE received funding from the National Institute of Justice (NIJ) to do research on the problem and to develop model policies and procedures for law enforcement agencies.

As a result, NOBLE published a law enforcement handbook that outlines a model response to racial and religious violence which is used broadly by the law enforcement

community and social service practitioners. NOBLE provided education and advocacy that resulted in the passage of federal legislation requiring the collection of data on the occurrence of hate violence incidents. With a grant from the Ford Foundation, NOBLE has drafted a training program and produced a videotape for law enforcement workers on racial violence entitled *Hate Crime: a Policy Perspective* aimed at training police officers in effective procedures for handling hate crimes. In addition, NOBLE has developed a training curriculum to deal with cultural clashes on college campuses. The curriculum is designed to sensitize college administrators, students and law enforcement personnel to the issue of racism.

Consequently, NOBLE joins the ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX M:

THE POLICE EXECUTIVE RESEARCH FORUM

The Police Executive Research Forum ("PERF") is a national organization of police executives from large- and medium-sized jurisdictions dedicated to promoting progressive policing through research, education, debate and national leadership.

Because of our commitment to protecting all persons equally under the law and the devastation that hate crimes can wreak on victims and their communities, PERF believes that the police community should aggressively seek out and respond to bias crime incidents. One tool police in 31 states now have to combat hate crime is the penalty enhancement statute. Penalty-enhancement statutes send a strong message to the public that law enforcement authorities take hate crimes very seriously and that perpetrators will face considerable punishment. We believe that penalty-enhancement statutes, when used as part of a comprehensive approach to hate crime, are effective and important tools—tools that are now in question as a result of the ruling in *State v. Mitchell*.

APPENDIX N:

THE SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center is a non-profit organization founded in 1971 to protect the rights of poor people and minorities. Its attorneys have litigated numerous human and civil rights cases in federal and state courts across the country, including cases focusing on racial and sexual discrimination, voting rights, capital punishment, and racial violence.

In 1979, the Center established the Klanwatch Project to monitor the activities of white supremacist organizations and individuals throughout the United States. Klanwatch has been instrumental in providing federal and state law enforcement authorities with substantial assistance in combatting and prosecuting hate crimes and has developed the largest intelligence base on white supremacist groups that exists in this country. Using that data base, the Center itself has brought many successful civil lawsuits against white supremacists groups and their members. *See, e.g., Berhanu* v. *Tom Metzger, et al.*, No. A-8911-07007 (Ore.Cir.Ct.) (civil section against the White Aryan Resistance and its leaders and agents for the beating death of an Ethiopian student in Oregon); *Person* v. *Miller*, 854 F.2d 656 (4th Cir. 1988) (criminal contempt proceeding against Klan members violating a court order against paramilitary activities); *McKinney* v. *Southern White Knights*, No. C87-565-CAM (N.D. Ga. 1988) (civil action against Klan groups and individuals for assaulting peaceful civil rights marchers); *Donald* v. *United Klans of America*, No. 84-0725 (S.D. Ala. 1987) (civil action on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association* v. *Knights of the Ku Klux Klan*, 518 F.Supp.993 (S.D. Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

The Southern Poverty Law Center is deeply concerned about the steady rise in hate crimes by various fringe

groups and white supremacist organizations. The Southern Poverty Law Center joins the ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX O:

THE UNION OF AMERICAN HEBREW CONGREGATIONS

The Union of American Hebrew Congregations (UAHC) is the Congregational arm of Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has consistently opposed hate crimes, generally, and anti-Semitism more particularly. It has likewise been a strong advocate for an expansive view of First Amendment Rights and Freedoms.

APPENDIX P:

PENALTY ENHANCEMENT STATUTES NATIONWIDE

STATE

California

Cal. Penal Code 190.2(a)(16) (West Supp. 1991)
Cal. Penal Code 302 (West 1988 & Supp. 1991)
Cal. Penal Code 422.6-7 (West 1988)
Cal. Penal Code 594, 594.3 (West 1988)
Cal. Penal Code 1170.8 (West 1985)
Cal. Penal Code 11410-11413 (West 1988 & Supp. 1991)
Cal. Civ. Code 51.7 (West 1982 & Supp. 1988)

Colorado

Colo. Rev. Stat. 18-9-113, -121 (West 1990 & Supp. 1991)

Connecticut

Conn. Gen. Stat. Ann. 46a-58 (West 1986)
Conn. Gen. Stat. Ann. 52-251b (West Supp. 1991)
Conn. Gen. Stat. Ann. 53-37a (West 1986)
Conn. Gen. Stat. Ann. 53a-40a, -181b (West 1986 & Supp. 1991)
Conn. Gen. Stat. Ann. 29-7m (West 1988)

Florida

Fla. Stat. Ann. 806.13 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 871.01-.03 (West 1975 & Supp. 1991)
Fla. Stat. Ann. 876.17-.19 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 775.0845, -.085 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 877.19 (West 1976 & Supp. 1991)

Idaho

Idaho Code 18-6201, -7901 to -7904 (1987)
Idaho code 67-2905 (1989)

Illinois

Ill. Ann. Stat. ch. 38, 12-2(2), 7.1 (Smith-Hurd Supp. 1991)

Ill. Ann. Stat. ch. 38, 21-1.2 (Smith-Hurd Supp. 1991)
Ill. Ann. Stat. ch. 38, 1005-5-3.2 (Smith-Hurd 1982 & Supp. 1991)
Ill. Ann. Stat. ch. 127, 55a (Smith-Hurd Supp. 1991)

Iowa

Iowa Code Ann. 729.5 (West 1991 & Supp. 1991)

Maryland

Md. Ann. Code art. 88B, 9-10 (1985 & Supp. 1990)
Md. Ann. Code art. 27, 10A (1988)
Md. Ann. Code art. 27, 470A (1988 & Supp. 1990)

Massachusetts

Mass. Ann. Laws ch. 6, 116B (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 6, 16-19 (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 265, 39 (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 266, 98 (Law Co-op. Supp. 1980)
Mass. Ann. Laws ch. 266, 127A (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 266, 128B (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 272, 38 (Law Co-op. 1980)

Michigan

Mich. Comp. Laws Ann. 752-525 (West 1991)
Mich. Comp. Laws Ann. 750.147b, .217, .396 (West 1991)

Minnesota

Minn. Stat. Ann. 609.2231, .28, .5531, .595, .605, .735, .795 (West 1987 & Supp. 1991)

Missouri

Mo. Ann. Stat. 79.450 (Vernon 1987)
Mo. Ann. Stat. 574.085, .090, .093 (Vernon Supp. 1991)

Montana

Mont. Code Ann. 45-5-221 to -222 (1989)

Nevada

Nev. Rev. Stat. Ann. 83.130 (Michie 1991)
Nev. Rev. Stat. Ann. 201.270 (Michie 1986)
Nev. Rev. Stat. Ann. 206.125 (Michie Supp. 1989)
Nev. Rev. Stat. Ann. 207.185 (Michie Supp. 1989)

New Hampshire

N.H. Rev. Stat. Ann. 651.6 (1986 & Supp. 1990)

New Jersey

N.J. Stat. Ann. 2C:12-1 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:33-4, -9 to -11 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:43-7 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:44-3 (West 1982 & Supp. 1991)

New York

N.Y. Civil Rights 40-c to -d (McKinney Supp. 1991)
N.Y. Penal Law 240.21, .30, .31 (McKinney 1989)
N.Y. Penal Law 155.30(9) (McKinney Supp. 1991)
N.Y. Penal Law 165.45(6) (McKinney Supp. 1991)

Ohio

Ohio Rev. Code Ann. 2909.05 (Baldwin 1990)
Ohio Rev. Code Ann. 2927.11-.12 (Baldwin 1990)

Oklahoma

Okla. Stat. Ann. tit. 21, 850 (West 1991)
Okla. Stat. Ann. tit. 21, 914-915 (West 1983)
Okla. Stat. Ann. tit. 21, 1765 (West 1983)
Okla. Stat. Ann. tit. 21, 1301-1303 (West 1983)

Oregon

Or. Rev. Stat. 30.190, .200 (1988)
Or. Rev. Stat. 166.075, .155, .165 (1990)
Or. Rev. Stat. 181.550 (1991)

Pennsylvania

18 Pa. Cons. Stat. Ann. 2710 (Purdon 1983)

18 Pa. Cons. Stat. Ann. 3307 (Purdon 1983 & Supp. 1991)
18 Pa. Cons. Stat. Ann. 5509 (Purdon 1983 & Supp. 1991)
71 Pa. Cons. Stat. Ann. 250(i) (Purdon 1990)
71 Pa. Cons. Stat. Ann. 251 (Purdon 1990)

Rhode Island

R.I. Gen. Laws 9-1-35 (1985)
R.I. Gen. Laws 11-11-1, -42-3, -44-31, -53-1 to -2 (1981 & Supp. 1990)
R.I. Gen. Laws 42-28-46 (1988)

Vermont

Vt. Stat. Ann. tit. 13, 1454-1457 (Supp. 1990)

Washington

Wash. Rev. Code Ann. 9.61.160, .180 (West 1988)
Wash. Rev. Code Ann. 9A.36.080 (West 1988 & Supp. 1991)

West Virginia

W.Va. Code 61-6-13, -21, -22 (1989)

Wisconsin

Wis. Stat. Ann. 895.75 (West 1983 & Supp. 1990)
Wis. Stat. Ann. 939.641, .645 (West 1982 & Supp. 1990)
Wis. Stat. Ann. 943.012 (West 1982 & Supp. 1990)

Distict of Columbia

D.C. Code Ann. 22-1114 (1989)
D.C. Code Ann. 22-3112.2 to -3112.4 (1989)
D.C. Code Ann. 4001-4004 (Supp. 1991)

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

In the Supreme Court

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United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
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VS.

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BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THE STATE OF WISCONSIN

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California v. Davis, 68 Cal. 2d 481 (1968) 22
California v. Joshua, Cal. Super. Ct. No. 95693, Cal. App. Ct. No. H008944 (pending before the Sixth App. Dist.) 5
California v. Lashley, 1 Cal. App. 4th 938 (1991), *cert. denied*, ____ U.S. ____, 113 S. Ct. 126 (1992) 8
California v. Mearra, Cal. Super. Ct. No. 116304, Cal. App. Ct. No. A055072 (pending before the Sixth App. Dist.) 5
California v. Schwarz, Cal. Super. Ct. No. 145513, Cal. App. Ct. No. A059514 (pending before the First App. Dist.) 5
Commonwealth v. Rink, 574 A.2d 1078 (Pa. Super. Ct. 1990) 23
Commonwealth v. Stephens, 515 N.E.2d 606 (Mass. App. Ct. 1987) 24
Dobbins v. Florida, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992), *jurisdiction accepted*, No. 80,500 (Fla. Dec. 23, 1992) 12, 13
Gooding v. Wilson, 405 U.S. 518 (1972) 21, 22
Grimm v. Churchill, 932 F.2d 674 (7th Cir. 1991) 23
Kinser v. Maryland, 591 A.2d 894 (Md. Ct. Spec. App. 1991) 23
Lewis v. City of New Orleans, 415 U.S. 130 (1974) 21, 22
New York v. Grupe, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988) 19, 24
Oregon v. Beebe, 680 P.2d 11 (Or. Ct. App. 1984) 19, 24
Oregon v. Hendrix, 813 P.2d 1115 (Or. Ct. App. 1991), *aff'd*, 314 Or. 170 (1992), *petition for cert. filed* (Oct. 26, 1992) 20, 24
Oregon v. Plowman, 838 P.2d 558 (Or. 1992) ... 11, 12, 13, 22
R.A.V. v. City of St. Paul, ____ U.S. ____, 112 S. Ct. 2538 (1992) ..... *passim*
Spence v. Washington, 418 U.S. 405 (1974) 8

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Texas v. Johnson, 491 U.S. 397 (1989)	8
United States v. Bledsoe, 728 F.2d 1094 (8th Cir.), *cert. denied*, 469 U.S. 838 (1984)	19, 23
United States v. Ebans, 800 F.2d 1422 (6th Cir. 1986)	23
United States v. Eichman, 496 U.S. 310 (1990)	8
United States v. Franklin, 704 F.2d 1183 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983)	23
United States v. Gilbert, 813 F.2d 1523 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987)	*passim*
United States v. Messerlain, 832 F.2d 778 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988)	8
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*
Wisconsin v. Mitchell, 485 N.W.2d 807 (Wis.), *cert. granted*, ____ U.S. ____, 61 U.S.L.W. 3266 (1992)	*passim*

United States Constitution

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Statutes and Regulations

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§ 245	23, 24, 25
42 U.S.C. §§ 2000a *et seq.*	26
§§ 2000d *et seq.*	26
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Cal. Civ. Code § 51.7 (West 1992)	5
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H.R. 4797, 102d Cong., 2d Sess. (1992)	2, 3
S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1837 (1969)	4

Other Authorities

John Stuart Mill, *On Liberty* (Hackett Publishing Co. 1978) (1859)	11
H. Ehrlich, *Campus Ethnoviolence and the Policy Options*, National Institute Against Prejudice & Violence, Report No. 4 (Mar. 1990)	4
P. Ephross, A. Barnes, H. Ehrlich, K. Sandnes, and J. Weiss, *The Ethnoviolence Project-Pilot Study*, National Institute Against Prejudice & Violence, Report No. 1 (Oct. 1986)	*passim*
S. Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333 (1991)	21
B. Levin, *A Practical Approach to Bias Crimes for Police* (1992)	15, 16
B. Levin, *Hate Crimes Seminar Module for Patrol Officers* (1992)	17
B. Levin, *Background Report on Hate Crimes, California*, Stanford Law School (Apr. 1991)	17
J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts* 1983-1987 (1989)	5, 15
McLeod, *State's Astonishing Population Changes Likely To Mean More Minority Representation in Legislature*, San Francisco, Chronicle, Feb. 26, 1991, A1	4
J. Weiss, H. Ehrlich, and B.E.K. Larcom, *Ethnoviolence At Work*, Journal of Intergroup Relations, National Institute Against Prejudice & Violence, Report No. 6 (Winter 1991-92)	17
Anti-Defamation League Special Report: The Los Angeles Riot—Extremist Exploitation (1992)	17

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OTHER AUTHORITIES

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California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence, Final Report (Apr. 1990) 4

California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence, 1986 Report 5

Campus Ethnoviolence, National Institute Against Prejudice & Violence, Report No. 5 (1992) 17

Freedom From Fear—Ending California's Hate Violence Epidemic, Final Report of the Lieutenant Governor's Commission on the Prevention of Hate Violence (May 1992) 17, 18

Hate Crime In Massachusetts—Preliminary Annual Report—January - December 1990, Executive Office of Public Safety Criminal History Systems Board, Crime Reporting Unit (Jan. 24, 1991) 15

New York State Governor's Task Force on Bias Related Violence—Final Report (Mar. 1988) 17

1991 Audit of Anti-Semitic Acts, Anti-Defamation League (1992) 4

Report to the Nation on Crime and Justice, U.S. Department of Justice (2d ed. 1988) 15

Memorandum re Yearly Recap of Hate Crimes Statistics 1991, from Officer S. Bargioni of the Hate Crimes Unit of the San Francisco Police Department to Captain J. Willet, Commanding Officer, Special Investigations Division of the San Francisco Police Department (Jan. 16, 1992) 5

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I

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.

The Lawyers' Committee is a legal services organization which, since 1968, has served communities traditionally under-represented within our society. A primary mandate of the Lawyers' Committee is to provide free legal services to individuals and communities, usually poor, who have experienced discrimination because of their race, ethnicity, national origin, color or immigration status. For almost twenty-five years, the Lawyers' Committee has worked closely with communities of color and immigrant and refugee communities to ensure that these communities' civil rights are sufficiently protected and fully enforced.

In 1991, the Lawyers' Committee initiated its Racial Violence Project. The Racial Violence Project is a multifaceted effort to

address both the causes and effects of racially motivated violence throughout the San Francisco Bay Area. The Project's primary efforts include providing public education about and encouraging utilization of California's hate violence and hate crime laws.

The case of *Wisconsin v. Mitchell*, 485 N.W.2d 807 (Wis. 1992) ("*Mitchell*") raises issues of great importance to the clients served by this *amicus curiae*. In *Mitchell* the Wisconsin Supreme Court overturned one of that state's laws punishing hate crimes. California, along with some 30 other states, has enacted substantially similar legislation aimed at punishing hate crimes. These laws, in California and elsewhere, are vital forces in safeguarding the civil rights of individuals from traditionally underrepresented communities. The laws were enacted to combat the increasing incidence of discriminatory or bias-motivated actions and generally are drafted in a manner that guarantees no impingement of First Amendment rights.

Due to the similarity between the Wisconsin and California statutes in particular, this Court's scrutiny of the *Mitchell* decision will have a direct impact on the viability of California's hate crimes laws as well as the interests of the clients of this *amicus curiae*.[1]

II

INTRODUCTION

What is a hate crime? In October 1992 the United States House of Representatives defined the term as "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice."[2] Does such a crime constitute an exercise of protected speech or is it unprotected discrimination? The Wisconsin Supreme Court in *Mitchell* found it was the former. Does a sentence enhancement based on such conduct violate a defendant's right to freedom of "thought?" The Wisconsin Supreme Court found that it did.

A simple review of the facts, before we even reach this Court's First Amendment jurisprudence, aptly illustrates the Wisconsin Supreme Court's errors. On October 7, 1989 a group of young African American men and boys were gathered at an apartment complex in Kenosha, Wisconsin. *Mitchell*, 485 N.W.2d at 809. Todd Mitchell was a member of the group. During the evening the group discussed a scene from the movie "Mississippi Burning" where a white man beat a young African American boy. The discussion of the movie eventually led to a remark by Mitchell: "Do you feel all hyped up to move on some white people?" As Gregory Reddick, a 14 year old white male approached, the group continued to discuss finding and assaulting white people. When the group spotted Reddick it descended upon him, battering him brutally and leaving him with serious and permanent injuries. *Id.*

The conduct at issue in *Mitchell*, the discriminatory infliction of crime, is not a phenomenon limited to race or ethnicity. As is evident by a multitude of federal and state antidiscrimination laws, hateful acts of prejudice spread to the realms of religion, gender, national origin, sexual orientation and disability. The San Francisco Bay Area, like the rest of the country, has experienced an alarming number of incidents aimed at gays and lesbians in addition to an increase in the number of incidents aimed at members of other classes.

Do laws which aim to punish and deter this discrimination infringe on First Amendment rights? *Amicus curiae* submits that they do not. None of the conduct targeted by hate crimes laws such as Wisconsin's constitutes an exercise of First Amendment rights. The criminalized conduct is discrimination and should be dealt with as such. *Amicus curiae* urges this Court to reject the *Mitchell* court's elevation of discrimination to protected expression.

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[1] Presently, at least four cases focusing on the constitutionality of California's hate crime statutes are pending in the California courts. All involve hate crimes inflicted upon gay victims. *See infra* note 8.

[2] H.R. 4797, 102d Cong., 2d Sess. (1992). This definition arises from a bill directing the United States Sentencing Commission to make sentencing guidelines for federal criminal cases. Specifically, Congress directed the Commission to "provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes."

Congress' full definition of "hate crime" was:

> [A] crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.

Id.

III

SUMMARY OF ARGUMENT

A. THE COUNTRY HAS A COMPELLING NEED FOR HATE CRIME STATUTES.

> Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro [sic] community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.[3]

Though clearly not a new phenomenon, the occurrence of "hate violence" and "hate crimes" is on the rise throughout the country.[4] A variety of theories have been advanced about the causes of this recent increase in bias-motivated activity, from the national economic downturn to a lack of political leadership on issues of diversity.[5] However, none of these theories disputes the fact that such incidents are indeed increasing in frequency.[6] In San Francisco alone, according to statistics compiled by the San Francisco Police Department's Hate Crimes Unit, there was a total of 401 incidents of hate violence and crime reported to the police during 1991.[7] Our common experience informs us that the figure is significantly greater since most incidents remain unreported to the police for a variety of cultural and political reasons.[8]

In response to this growing and devastating societal problem (and in response to the recommendations of its Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence),[9] the California legislature passed civil and criminal statutes which provide remedies to victims as well as recourse for the State against perpetrators of hate violence and hate crime. *See, e.g.*, Cal. Penal Code §§ 422.6 and 422.7 (West 1992); Cal. Civ. Code §§ 51.7 and 52.1 (West 1992). In California, as in

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[3] S. Rep. No. 721, 90th Cong., 2d Session, *reprinted in* 1968 U.S.C.C.A.N. 1837, 1842 (1969).

[4] The terms "hate violence" and "hate crime" are generally understood to encompass harassing, intimidating, violent behavior and conduct motivated by bias or discrimination. *See California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, Final Report (Apr. 1990); H. Ehrlich, *Campus Ethnoviolence and the Policy Options*, National Institute Against Prejudice & Violence, Report No. 4 (Mar. 1990). *See also* H.R. 4797, *supra*.

[5] At least in California, the pressures accompanying the huge growth of the State's minority population are certainly a leading factor of the increase in hate crimes. *See* McLeod, *State's Astonishing Population Changes Likely To Mean More Minority Representation in Legislature*, San Francisco Chronicle, Feb. 26, 1991, at A1. As of the 1990 census, minorities made up 43% of the State's population, a rise of 10% from a decade ago. *Id.* Over the span of a decade, the Hispanic population grew by 70% to 7.6 million and the Asian population more than doubled to 2.8 million. *Id.* Nearly 4 in 10 Asian Americans live in California with the largest numbers concentrated in counties surrounding San Francisco and Los Angeles. *Id.* Similarly, California is home to 40% of the Hispanics living in the United States. *Id.*

[6] *See 1991 Audit of Anti-Semitic Acts*, Anti-Defamation League (1992); *California Attorney General's Report, supra*; P. Ephross, A. Barnes, H. Ehrlich, K. Sandnes, and J. Weiss, *The Ethnoviolence Project—Pilot Study*, National Institute Against Prejudice & Violence, Report No. 1 (1986); J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts* 1983-1987 (1989).

[7] Memorandum re Yearly Recap of Hate Crimes Statistics 1991, from Officer S. Bargioni of the Hate Crimes Unit of the San Francisco Police Department to Captain J. Willet, Commanding Officer, Special Investigations Division of the San Francisco Police Department (Jan. 16, 1992).

[8] Local examples of hate violence and hate crimes which have been reported include:

- —an attack on an African American couple in Fremont by a man wielding a tree limb, calling them derogatory names and demanding they get out of the neighborhood;
- —ongoing harassment of a Puerto Rican family in San Francisco by a neighbor, which included broken glass in their driveway and on their front porch, racial epithets being spray painted on their vehicles, tire slashing and threats of physical violence against the children of the family;
- —at least three separate cases in the past year in which gay men were battered because of their sexual orientation and the defendants' sentences enhanced pursuant to California's hate crimes laws. *See California v. Mearra*, Cal. Super. Ct. No. 116304, Cal. App. Ct. No. A055072 (pending before the First App. Dist.); *California v. Joshua*, Cal. Super. Ct. No. 95693, Cal. App. Ct. No. H008944 (pending before the Sixth App. Dist.); and *California v. Schwarz*, Cal. Super. Ct. No. 145513, Cal. App. Ct. No. A059514 (pending before the First App. Dist.)

[9] *California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, 1986 Report.

other states, the enhancement statute, Penal Code section 422.7, is a necessary component of the larger scheme of civil rights laws.[10]

B. ENHANCEMENT STATUTES, SUCH AS WISCONSIN'S SECTION 939.645, DO NOT IMPLICATE NOR VIOLATE THE FIRST AMENDMENT.

Based in part on this Court's recent decision *R.A.V. v. City of St. Paul*, ____ U.S. ____, 112 S. Ct. 2538 (1992) ("*R.A.V.*"), the Wisconsin Supreme Court found that the enhancement of Mitchell's sentence was an impermissibly "content-based" prohibition on his First Amendment right to free speech. *Mitchell*, 485 N.W.2d at 815. Wisconsin's reliance on *R.A.V.* to determine the validity of its enhancement statute is misplaced. In *R.A.V.*, this Court found facially invalid a local "fighting words" ordinance which specifically prohibited the expression of certain viewpoints.

Enhancement statutes such as Wisconsin's are distinctly different from "fighting words" statutes (like the one at issue in *R.A.V.*) because they criminalize activity on a content-neutral basis and punish only conduct. The First Amendment is not even implicated by the statutes because they do not regulate, nor interfere with, the right to free expression. Rather, the statutes' aim as well as their effect is to prohibit *discrimination*, a legislative goal that is compelling.

Even assuming that expressive rights are peripherally implicated by the enforcement of the statutes, it is clear that hate crimes enhancement statutes are content-neutral laws which only secondarily affect conduct's expressive content. As such, they pass constitutional muster under the well-established test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Accordingly, this Court should determine that Wisconsin's enhancement statute, Wisconsin Statute section 939.645 (West 1991) ("section 939.645"), is constitutional.

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[10] *See supra* note 8 (describing the *Mearra, Joshua*, and *Schwarz* cases).

IV

ARGUMENT

A. NO FIRST AMENDMENT SCRUTINY SHOULD BE APPLIED TO SECTION 939.645 BECAUSE IT IS A GENERAL CRIMINAL STATUTE PROHIBITING CONDUCT THAT NEITHER AIMS AT NOR AFFECTS EXPRESSIVE ACTIVITY.

The *Mitchell* court errs in applying the First Amendment where the First Amendment simply does not apply. Section 939.645 is a penalty enhancement statute, mandating increased penalties when already criminal conduct, such as assault, battery, or murder, is inflicted in a discriminatory fashion—*i.e.* because of the victim's membership in an identifiable class of persons. As such, the statute enhances the penalty for conduct: discrimination.

Section 939.645 provides for the enhancement of certain crimes if a person:

> Intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Wis. Stat. § 939.645.[11] The statute is nearly identical to the statute in California which provides for an enhancement if:

> [T]he crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation . . . .

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[11] Section 939.645 carefully excludes its application when the underlying crime itself is one that aims at discrimination. Section 939.645(4) provides: "This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction of that crime." Thus, the statute avoids the imposition of any sort of "double" punishment.

Cal. Penal Code § 422.7.[12] A multitude of other states has similar enhancement provisions.[13] Many of these states, in addition to still other states, also statutorily punish hate crimes independent of the commission of any other crime.[14]

The Supreme Court has long held that the First Amendment protects *expression* and not conduct. *See Spence v. Washington*, 418 U.S. 405, 409 (1974). By its very terms, the First Amendment shelters simply speech: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Admittedly, courts have extended First Amendment protection to conduct when that conduct is imbued with a certain degree of expressive quality. Thus, the Supreme Court has struck down government regulations when they overreachingly restrict an individual's ability to communicate through conduct. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); and *O'Brien*, 391

[12] Because the right to personal security is one that is recognized under both federal and state law, freedom from assault, battery or other violent acts is clearly one of the "rights" protected by section 422.7. *See United States v. Messerlian*, 832 F.2d 778, 790 n.20 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *California v. Lashley*, 1 Cal. App. 4th 938, 950 nn.8-9 (1991); Cal. Civ. Code § 51.7.

[13] *See* Appendix at A-1.

[14] For example, in California, Penal Code section 422.6 provides:

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, or sexual orientation.

* * * *

(c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

See Appendix at A-1 for other states which similarly punish hate crimes independent of the commission of any additional crime.

U.S. 367 (draft card burning). In effect, the recent decision of the Supreme Court in *R.A.V.* is the latest chapter in this chronicle of protected expressive conduct, holding that cross burning, like flag and draft card burning, is in some circumstances conduct sufficiently imbued with expressive qualities for First Amendment protection.

However, when a governmental regulation targets conduct and only peripherally impacts expression, courts are loathe to extend First Amendment protection. This reluctance was perhaps most clearly enunciated in *Arcara v. Cloud Books*, 478 U.S. 697 (1985). In *Arcara* this Court addressed a state's closure of an adult bookstore out of which prostitutes operated. Petitioner, the owner of the bookstore, challenged the application of the state's prohibition of prostitution, arguing that it impeded his First Amendment rights by impermissibly burdening his bookselling activities. This Court disagreed, finding that the conduct targeted by the statute—prostitution—was not protected expression. *Arcara*, 478 U.S. at 705.

The Court found that the extent to which the regulation impeded the bookseller's freedom of expression was no different than that inherent in *any* criminal or civil sanction. The Court wrote:

> [W]e have not traditionally subjected every criminal and civil sanction . . . to [First Amendment] scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . . .

Id. at 706-07. Because the regulation at issue in *Arcara* involved neither of the situations where First Amendment scrutiny is proper, the Court concluded "the First Amendment is not implicated." *Id.* at 707.

The distinction between regulations affecting expressive conduct and regulations directed at conduct and only peripherally affecting expression was noted again by this Court in *R.A.V.* The statute at issue in *R.A.V.* provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but

> not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 112 S. Ct. at 2541. Because the statute prohibited *expressive* conduct based on its *content*, the Court found it offended First Amendment principles. "The government may not regulate [conduct] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 2545. However, the Court expressly rejected attempts, such as Respondent Mitchell's, to cloak non-expressive conduct with First Amendment protection:

> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination . . . *where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulations merely because they express a discriminatory idea or philosophy.*

Id. at 2546 (emphasis added). The Court *did not* find the statute in *R.A.V.* violated the First Amendment because it prohibited discrimination. The above quotation clearly shows that the Court recognized that acts of discrimination are not protected expression.[15] Rather, the Court found that the statute's *selection* of certain types of discriminatory *expression* violated the First Amendment.[16]

The above quotation also highlights two distinct differences between the statute at issue in *R.A.V.* and Wisconsin's section 939.645. First, the Wisconsin statute prohibits *conduct*, specifically the commission of a crime inflicted in a discriminatory or

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[15] Thus, the *Mitchell* court is somewhat disingenuous when it states that "[t]he ideological content of the thought targeted by the [Wisconsin] hate crimes statutes is identical to that targeted by the St. Paul ordinance—racial or other discriminating animus." 485 N.W.2d at 815.

[16] It is important to note that the defendant in *R.A.V.* was convicted pursuant to several statutes, but challenged only the "fighting words" conviction. The defendant in *R.A.V.* did *not* challenge his conviction under the Minnesota statute punishing racially motivated assaults, Minnesota Statute section 609.2231(4)(West 1992). *R.A.V.*, 112 S. Ct. at 2541 n.2.

bias-motivated fashion. It does not prohibit speech, or expressive conduct such as cross-burning, in any way. Second, section 939.645 is content-neutral. It does not selectively regulate conduct which expresses certain disfavored topics as did the *R.A.V.* statute.

For these reasons, *R.A.V.* is simply inapplicable to *Mitchell*. Indeed, application of *R.A.V.* to this case would run headlong into this Court's express qualification in *R.A.V.* that individuals who discriminate cannot justify their activity with the First Amendment merely because their discrimination includes a discriminatory idea or philosophy. Citing to and upholding federal statutes which prohibit discrimination, this Court rightfully rejected any such attempt to bootstrap an illegal activity such as discrimination into the First Amendment's sphere of protected activity.[17]

Recently, the Oregon Supreme Court came to the same conclusion addressing that state's hate crime laws. *Oregon v. Plowman*, 838 P.2d 558 (Or. 1992). At issue in *Plowman* was a statute similar to section 939.645 which criminalized "intentionally, knowingly or recklessly [causing] physical injury to another because of [the] perception of that person's race, color, religion, national origin or sexual orientation." *Id.* at 560 (quoting Oregon Revised Statute ("O.R.S.") 166.165(1)(a)(A) (Butterworth 1990)).[18] The defendant in *Plowman* argued, *inter alia*, that his

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[17] The distinction between protected expression and unprotected conduct was noted by John Stuart Mill:

> Such being the reasons which make it imperative that human beings should be free to form opinions and to express their opinions without reserve . . . . No one pretends [however] that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute . . . a positive instigation to some mischievous act. . . . Acts, of whatever kind, which without justifiable cause do harm to others, may be, and in more important cases absolutely require to be, controlled . . . .

John Stuart Mill, *On Liberty*, at 53 (Hackett Publishing Co. 1978) (1859).

[18] While O.R.S. 166.165(1)(a)(A) "creates and defines the crime of intimidation in the first degree," *Plowman*, 838 P.2d at 559-60, the defendant challenged it as a statutory enhancement. *Id.* at 562. The reasoning behind the challenge apparently rested on the fact that intimidation in the first degree is a Class C felony, while assault in the

conviction under the statute contravened his First Amendment rights to free speech "because a violation of [the statute] 'must necessarily be proved by the content of his speech.' " *Id.* at 564.

The Oregon Supreme Court rejected this argument, holding that the First Amendment right to free speech was not even implicated by the statute because the statute regulates only *conduct*. The court refused the defendant's attempt to analogize to *R.A.V.*, holding:

> The [*R.A.V.*] Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct . . . .
>
> [The Oregon Statute] is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here.

Id. at 565.

The Oregon court flatly rejected the defendant's argument that O.R.S. 166.165 proscribes communication because " 'it must necessarily be proved by the content of his speech or associations.' " *Id.* at 565. Paralleling this Court's analysis in *Arcara*, the *Plowman* court found speech was not necessarily implicated by the regulation; there was a multitude of evidentiary showings not involving speech that would establish the intent to discriminate. *Id.* Further, the *Plowman* court established that any burden on speech created by the fact that speech *might* be used to prove a violation of O.R.S. 166.165 was *de minimis* and no greater than the burden on speech presented by other crimes, such as attempted murder (where a defendant's intent, for example, might be proven by evidence of his spoken or written statements). *Id.*[19]

This Court should find the Oregon court's analysis persuasive. The *Plowman* court's interpretation of the First Amendment is without a doubt more consistent with this Court's First Amendment jurisprudence than the *Mitchell* court's obfuscation of established First Amendment principles. The First Amendment cannot be interpreted, as it is by the *Mitchell* court, as an instrument by which hateful acts of discrimination are elevated into the realm of protected expression. The First Amendment surely was never

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fourth degree—the basis of defendant's other conviction—is a Class A misdemeanor. *Id.* Thus, application of O.R.S. 166.165(1)(a)(A) acted as a *de facto* enhancement of the punishment the defendant would otherwise have received.

Respondent may argue that O.R.S. 166.165 is distinguishable from the Wisconsin statute because it requires "two or more persons acting together." *Id.* at 560. However, this is a distinction largely without a difference. Indeed, to the extent the Oregon statute differs from Wisconsin's due to its group action requirement, the difference would, if anything, require a more rigorous First Amendment scrutiny of the Oregon statute because it implicates associational as well as speech rights.

[19] An intermediate Florida court reached a similar conclusion in *Dobbins v. Florida*, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992), *jurisdiction accepted*, No. 80,500 (Fla. Dec. 23, 1992). *Dobbins* involved a Jewish boy who attempted to join a "Skinheads" association. When members of the association discovered that the boy was Jewish, a group led by the defendant Dobbins severely battered the boy. Dobbins was convicted under Florida's battery statute and sentenced pursuant to the enhancement provisions of Florida's hate crimes statute, Florida Statute section 775.085 (West 1992). Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim.

Fla. Stat. § 775.085.

The Florida court rejected Dobbins' argument that the statute improperly punished his opinion in contravention of the First Amendment. The court wrote:

> We agree that the First Amendment prohibits intrusion into the rights of one to freely hold and express unpopular, even intolerant, opinions.
>
> But section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. *It is only when one acts on such opinion to the injury of another that the statute permits enhancement.*

Id. at 923-24 (emphasis added). The court further rejected Dobbins' arguments that *R.A.V.* mandated application of the First Amendment to section 775.085 and that *R.A.V.* blessed the activity that section 775.085 punished. The court held that section 775.085 fell squarely within the type of regulation that *R.A.V.* excepted from First Amendment scrutiny because it " 'does not target conduct on the basis of its expressive content' " and because " 'acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.' " *Id.*

intended to support such conduct. While the *R.A.V.* decision does represent the most recent chapter in the Supreme Court's treatment of expressive conduct, it by no means blesses any and all conduct arguably containing a message. Indeed, the *R.A.V.* Court itself expressly refused the extension made by the Wisconsin Supreme Court whereby acts of discrimination become protected expression.

B. IF ANY FIRST AMENDMENT SCRUTINY IS WARRANTED, IT IS THE DEFERENTIAL *O'BRIEN* TEST AND THE WISCONSIN STATUTE IS VALID UNDER *O'BRIEN*.

Even assuming that the activity proscribed by section 939.645 has enough expressive qualities to warrant First Amendment scrutiny, the statute survives such scrutiny. As a regulation primarily of conduct that only secondarily impacts expressive activity, section 939.645 is valid if it meets the test set forth by this Court in *O'Brien*, 391 U.S. 367. The *O'Brien* test validates such a regulation if: (1) it is within the constitutional power of the state; (2) it furthers an important government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Id.* at 377.

1. It Is Manifestly Within the Power of the States to Proscribe Hate Violence.

The power of a state to criminalize violent behavior is clear. State and federal legislatures have the power to pass laws that are reasonably necessary to promote the public health, safety and morals, and "[t]here is no question that the proscription of force or [the] threat of force is within the government's powers." *United States v. Gilbert*, 813 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987). Further, the power of the State to prohibit discrimination is also beyond argument. *See, e.g.*, 42 U.S.C. §§ 2000e, *et seq.*; 42 U.S.C. §§ 3601, *et seq.*; Cal. Gov't Code §§ 12900-966 (West 1992).

Thus, section 939.645, which punishes violence against another (among other crimes) inflicted in a discriminatory or bias-motivated fashion, is clearly a valid exercise of Wisconsin's constitutional power to legislate for the public welfare.

2. Hate Crimes Statutes Further States' Interests in Eliminating Hate Violence and Preventing the Spiraling Violence that it Engenders Throughout the Community.

The states have an obviously important interest in preventing hate violence.[20] Hate crimes have a particularly pernicious effect on both their victims and the community at large.

Indeed, the hatred, bias and bigotry which motivate perpetrators to commit hate crimes distinguish such crimes from other assaults, threats of violence, or acts of vandalism. Studies indicate that hate crimes more often involve physical assault than conventional crimes. For example, the Department of Justice has found that approximately 10% of reported conventional crimes are personal assaults, while the remaining 90% are directed at property. *Report to the Nation on Crime and Justice*, U.S. Department of Justice, at 12 (2d ed. 1988). Statistics reported from several police departments, however, indicate that more than 30% of hate crimes are personal assaults. B. Levin, *A Practical Approach to Bias Crimes for Police* (1992); *see also Hate Crime In Massachusetts—Preliminary Annual Report—January-December 1990*, Executive Office of Public Safety Criminal History Systems Board, Crime Reporting Unit, at 3 (Jan. 24, 1991). Similarly, the National Institute Against Prejudice and Violence reported that physical assault was the most common form of hate crime, accounting for 24.8% of hate crimes reported in its sample. *The Ethnoviolence Project-Pilot Study, supra*, at 5.

There is also evidence that the injuries caused by hate crimes are more severe than those caused by other crimes. A study conducted by Professor Jack McDevitt interpreting the Boston Police Department's bias crime statistics found that 74% of bias-motivated assaults resulted in physical injury, with 30% of those injuries requiring hospital treatment. *The Study of the Character of Civil Rights Crimes in Massachusetts, supra.* Professor McDevitt's report contrasts these figures with statistics indicating

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[20] With regard to the State's interest in "[ensuring] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish," the Supreme Court in *R.A.V.* concluded: "We do not doubt that these interests are compelling." *R.A.V.*, 112 S. Ct. at 2549.

that only 29% of non-biased assaults nationally reported resulted in injury, with only 7% of those requiring hospitalization. *Id.*

In addition to the intensified violence and severity of injury which distinguish hate crimes from non bias-motivated offenses, studies show that hate crimes are distinctive in other respects. For example, the National Institute Against Prejudice & Violence reported that hate crimes most often occur as serial incidents ranging in a period of over several months to several years. *The Ethnoviolence Project-Pilot Study, supra,* at 5. This report found that 65% of victims reporting hate crimes experience numerous related attacks, while only 17.5% of hate crimes victims reported isolated incidents. *Id.* Other studies based on police department statistics indicate that hate crimes victims are more likely to be attacked by a group of offenders than by a single attacker. These studies also show that crimes motivated by bias are more often committed by strangers than non-bias crimes, and further that these crimes are often committed by informal groupings of strangers. *A Practical Approach to Bias Crimes for Police, supra.*

The insidious effects of hate crimes on the individual victim go well beyond physical injury, loss of property, and resulting financial loss. As was noted in a recent study:

- Many victims fear for their safety and for their family's safety. Most of them report changes in their lifestyle—where they walk, how they answer the phone, reactions to strangers, and suspicion of co-workers. Fear can take on paranoid qualities and intensely disrupt the lives of some victims.

- Another common response is anger. Several persons seemed almost surprised by the depth and power of the anger which the incident evoked in themselves. Some made reference to plans or fantasies of retaliation should the incidents be repeated.

- Another response pattern throughout the interviews concerns the children of the victims. Many parents, concerned about the safety of their children, will not let their children go outside to play.

- Conversely, many parents are concerned about the psychological effects of such isolation. One woman, worried about her children developing hatred for whites, tries to suppress her responses in front of the children.

The Ethnoviolence Project-Pilot Study, supra, at 7-9; *see also,* J. Weiss, H. Ehrlich, and B.E.K. Larcom, *Ethnoviolence at Work,* Journal of Intergroup Relations, National Institute Against Prejudice & Violence, Report No. 6, at 27-30 (Winter 1991-92).

Unfortunately, the victimization does not stop there. Hate crimes cause parallel psycho-physiological and behavioral effects in a victim's community as well. "For the co-victim, attacks on their peers are seen as danger signals to the entire group, as well as potential threats to their personal wellbeing." *Campus Ethnoviolence,* National Institute Against Prejudice & Violence, Report No. 5, at 11 (1992). "Unlike opportunistic crimes, these attacks are motivated less by a desire to rip people off than to rip them apart—psychically, if not always physically. . . . These attacks are intended to violate and isolate not just the victim, but the entire group." B. Levin, *Background Report on Hate Crimes, California.,* Stanford Law School, at 22-23 (Apr. 1991) (citation omitted).

Furthermore, the fact that hate crimes profoundly effect and terrorize not only immediate victims but also the community with which the victim is associated, is clearly indicated by the upward spiral in hate crime violence which often follows an initial incident. "Because the real targets are specified groups, rather than just individuals, there is significant potential for the spiral of violence to increase." B. Levin, *Hate Crimes Seminar Module For Patrol Officers,* at 12-13 (1992). An example of the spiraling violence is the events in New York City following the Howard Beach homicide in late December 1986. The number of hate crimes reported in New York City rose from a total of 20 incidents in December 1986, to approximately 75 incidents in January 1987. *New York State Governor's Task Force on Bias Related Violence—Final Report* (Mar. 1988). Similarly, the reaction to the verdict following the Rodney King beating resulted in 60 deaths, 2500 injuries and 750 incidents of arson in the Los Angeles area. *Anti-Defamation League Special Report: The Los Angeles Riot—Extremist Exploitation,* at 1 (1992).[21]

Recent studies in California indicate that hate crimes occur every day and are at "an all-time high." *Freedom From Fear—Ending California's Hate Violence Epidemic,* Final Report of the

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[21] An even more compelling example rests in the *Mitchell* case itself where a *fictional* incident of hate crime in "Mississippi Burning" spawned a retaliation by the victimized group.

Lieutenant Governor's Commission on the Prevention of Hate Violence (May 1992), App. at A-2. The Lieutenant Governor's Report provides an alarming amalgam of hate crimes statistics from 1991, including:

** The Anti-Defamation League of B'nai B'rith ("ADL") reported a 34 percent rise in attacks and threats against Jews in California.

** The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them.

** The National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473—an 11 percent increase—reported in San Francisco by Community United Against Violence.

** In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the Los Angeles County region, a 22 percent increase from 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish people, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.

** A marked increase in physical assaults over other methods of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.

** With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence and continue to be the favored targets. Latinos have also been a major target, particularly here in California with its large and growing Latino population. Asian Americans have suffered increased levels of violence directed at them as economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. Arab Americans were victimized by numerous attacks, threats and vandalism before, during, and after the Persian Gulf War of 1991.

Id. App. at A-2-A-3. Based on these facts, the Lieutenant Governor concluded: "We characterize these trends, we think not overdramatically, as an epidemic of hate violence." *Id.*

Clearly, states have an important interest in ending the "epidemic" of hate violence and protecting their citizens from the tragic effects of hate crimes. Numerous other courts, both federal and state, have agreed. *See, e.g., Gilbert,* 813 F.2d 1523; *United States v. Bledsoe,* 728 F.2d 1094 (8th Cir.), *cert. denied,* 469 U.S. 838 (1984); *New York v. Grupe,* 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988); and *Oregon v. Beebe,* 680 P.2d 11, 13 (Or. Ct. App. 1984).

3. The Interest Promoted by Statutes Like Wisconsin's Section 939.645 Is Unrelated to the Suppression of Expression.

The third prong of the *O'Brien* test focuses on the purpose of the statute at issue. If that statute's purpose, or the "interest promoted by the statute," is unrelated to the suppression of expression, then the law passes muster under the third prong.

As is stated *supra*, the purpose of statutes like section 939.645 is to address the phenomenon of hate crimes, the incidence of which the Lieutenant Governor has concluded in California is "epidemic." Nowhere in the Wisconsin statute or its legislative history is there any indication that the State's aim is to suppress expression.[22]

Despite this evidence to the contrary, Respondent may still argue that an *additional* purpose for the statute is restricting expression and that the two purposes are intertwined. This Court's treatment of such an argument in *Barnes v. Glen Theatre, Inc.,* ___ U.S. ___, 111 S. Ct. 2456 (1991) is instructive. In *Barnes*, the Court upheld Indiana's anti-nudity statute as applied to nude dancing. The Supreme Court conceded that public nudity can at times be expressive and that nude dancing is such expression. Nonetheless, in determining that the statute was unrelated to the suppression of expression, the Court found that "while the dancing to which [the statute] was applied had a communicative element, it was not the dancing that was prohibited, but simply its

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[22] Indeed, California Penal Code section 422.7's companion statute, section 422.6 (which criminalizes the same discriminatory conduct that is the subject of section 422.7) states that the statute does not apply "based upon speech alone." Cal. Penal Code § 422.6(c).

being done in the nude." *Id.* at 2463. The Court also noted that the same erotic message could be, and was, expressed in the same strip clubs by dancers wearing minimal clothing—that is, there were alternative means of expressing the same message without the prohibited conduct. *Id.*[23]

Applying the *Barnes* analysis to section 939.645, it is clear that section 939.645 is as unrelated to the suppression of expression as is the statute in that case. Section 939.645 does not prohibit discriminatory animus, or its expression, but only the manifestation of that hatred in an act, for example an assault or battery. To paraphrase the Court in *Barnes*, it is not the expression of hatred that is prohibited, but simply its manifestation as violence.[24]

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[23] A decision rendered by an Oregon appellate court addressing the same statute at issue in *Plowman* is also instructive. *Oregon v. Hendrix*, 813 P.2d 1115 (Or. Ct. App. 1991), *aff'd*, 314 Or. 170 (1992), *petition for cert. filed* (Oct. 26, 1992). *Hendrix* involved the case of a co-defendant to the defendant in *Plowman* who also challenged Oregon's intimidation statute on First Amendment grounds. As the Oregon Supreme Court held in *Plowman*, the *Hendrix* court found that the First Amendment was not even implicated by the statute because the statute regulated conduct, not speech. The *Hendrix* court based its holding on the following findings:

> No person is subject to punishment under the Intimidation Law merely for holding or expressing opinions that are inimical to others because of their race, color, religion, national origin or sexual orientation. The focus of the statute is to forbid a result: physical injury.... Although some conduct, such as flag burning during a political demonstration, is "expressive" and, therefore, protected by the First Amendment, we are aware of no case ... that holds that the act of inflicting physical injury on another, however motivated, is constitutionally protected expression. If fighting words are not worthy of First Amendment protection, the fight itself must be equally unworthy.

Hendrix, 813 P.2d at 1119 (citation omitted).

[24] And to paraphrase the court in *Hendrix*, *supra* note 23, the result punished by the statute is not speech, but rather violent crime inflicted in a discriminatory manner.

4. The Incidental Restrictions on Free Expression Caused by Section 939.645—If There Are Any—Are No Greater than Are Essential for Eliminating Discriminatory Violence.

As a threshold matter, it is simply unclear what expression is restricted, even incidentally, by Wisconsin's section 939.645. As an enhancement statute, section 939.645 operates only when another, independent crime has been committed. Persons wishing to espouse their hatred are not prohibited from doing so in any number of ways—they can still hold rallies, make speeches, form protests, and distribute leaflets—they just cannot do so in a manner that is prohibited by other provisions of Wisconsin's statutes.

The only plausible First Amendment argument that the Respondent might make is that the statute chills expression because evidence of speech *might* be admissible at trial to show motive. Thus, for example, individuals are restricted in expressing views that are racist, sexist, etc., due to their fear that in a later criminal conviction evidence of the speech will be used against them. This argument has many flaws, not the least of which is the fact that it is extremely implausible.[25] Further, as was noted by the Oregon

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[25] The *Mitchell* court relies heavily for this proposition, as it does throughout its opinion, on an article by Professor Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333 (1991).

With respect to the chill argument, Professor Gellman writes:

> It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Id. at 361 (emphasis in original) (*cited in Mitchell*, 485 N.W.2d at 316). Professor Gellman and, by incorporation, the *Mitchell* court, ignore two critical facts. First, as a practical matter, for any chill to inhere in a hate crimes statutes, the chilled individual *must* contemplate the eventual commission of the hate crime. All of the cases upon which Professor Gellman relies for her chill argument are cases in which certain forms of *speech* were expansively regulated, thereby chilling other forms of speech. *See Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). None of the cases

Supreme Court in *Plowman*, evidence of speech is already admissible at trials for innumerable intent-based crimes, such as any of the crimes of attempt, to prove motive and intent. *Plowman*, 838 P.2d at 564. The California Supreme Court has noted in *California v. Davis*, 68 Cal. 2d 481, 486 (1968), sustaining the constitutionality of California's incitement to riot act, "illegal conduct is not protected merely because it is in part initiated, evidenced, or carried out by language."

Even assuming, however, that section 939.645 might incidentally "impact" expression, it does so no more than is essential to further the governmental interest in ending hate violence. In *Barnes*, the Supreme Court noted that the antinudity statute at issue there was almost by definition narrowly tailored: "[T]he statutory prohibition is not a means to some greater end, but an end in itself." *Barnes*, 111 S. Ct. at 2463. In other words, the most direct way to prohibit public nudity is to prohibit public nudity. Enhancement statutes like Wisconsin's section 939.645 are no different—their purpose is to prevent discrimination and they do so in the most direct manner possible by punishing the act of discrimination itself. No other means could serve this end.

Thus, under the four prong *O'Brien* test, section 939.645 does not violate the First Amendment.

C. IF THIS COURT ADOPTS THE *MITCHELL* COURT'S ANALYSIS, EVERY LAW PROHIBITING DISCRIMINATION IS RENDERED SUSPECT TO FIRST AMENDMENT ATTACK.

Rather than follow either the *Arcara* or *O'Brien* analyses, the *Mitchell* court, analogizing to the statute in *R.A.V.*, found section 939.645 to be an impermissible "content-based" restriction of Mitchell's First Amendment rights. The *Mitchell* court based its ruling on two findings. First, the court held that section 939.645 directly violates the First Amendment because it punished the defendant solely on the basis of his thoughts. In order to prove discriminatory motive, the court reasoned, the statute required evidence of the defendant's reasons for selecting the victim. The

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dealt with a state's regulation of crime where punishment *might* be based upon speech by the perpetrator, thereby, in Professor Gellman's words, "chilling" the perpetrator's commission of that crime. Second, even in instances of such a chill, the effect is no different from that of a multitude of crimes—such as the crimes of attempt, *see infra*—an effect which every jurisdiction in the country has deemed acceptable.

court held that this requirement amounted to punishing the defendant for his thoughts, and "[p]unishment of one's thought, however repugnant the thought, is unconstitutional." *Id.* at 814. Discriminatory motive, the court concluded, can never be an element of a crime. *Id.*

Second, the *Mitchell* court held that the statute was fatally overbroad, and thus indirectly violated the First Amendment by chilling protected speech. 485 N.W.2d at 815-17. The court explained that producing evidence of the defendant's speech in order to prove motive would make people fearful of expressing discriminatory views lest that expression subsequently be entered as evidence against them. *Id.* at 815-16.

The *Mitchell* court's first mistake is its holding that discriminatory motive can never be an element of a crime without violating the First Amendment. Such a rule has no foundation in the law. Indeed, there are a number of federal and state criminal laws which proscribe bias-motivated conduct.[26] Further, the decisions of numerous state and federal courts support the notion that discriminatory motive can be and frequently is an element of criminal statutes.[27] Both federal and state statutes and case law

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[26] *See, e.g.*, 18 U.S.C. § 245; 42 U.S.C. § 3631. *See also* Appendix at A-1 (setting forth states with hate crimes laws comparable to section 939.645).

[27] *United States v. Ebens*, 800 F.2d 1422, 1429 (6th Cir. 1986) (overturning defendant's conviction under 18 U.S.C. § 245, but noting that: "It was altogether proper for the jury to consider this evidence [of verbal harassment] and the comments made by [the defendant] as bearing upon his specific intent."); *Bledsoe*, 728 F.2d 1094 (upholding a conviction under 18 U.S.C. § 245, noting that there was sufficient evidence to conclude that the attack was motivated by the victim's race); *United States v. Franklin*, 704 F.2d 1183, 1188 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983); *Kinser v. Maryland*, 591 A.2d 894 (Md. Ct. Spec. App. 1991) (upholding a conviction under Maryland's racial assault statute where evidence of racial motive was shown by defendant's statement: "[Y]ou better lock me up now or I'll take care of the nigger myself."); *Grimm v. Churchill*, 932 F.2d 674 (7th Cir. 1991) (finding probable cause for arrest under Illinois' hate crimes statute when defendant uttered racial slurs, had history of making racial confrontations, and arrest occurred at site of previous racial confrontations); *Commonwealth v. Rink*, 574 A.2d 1078 (Pa. Super. Ct. 1990) (defendant's urging crowd of teenagers to "Kill the nigger; get him," sufficient without showing of further activity to complete offense of ethnic intimidation); *Commonwealth v. Stephens*, 515 N.E.2d 606

thus stand in contravention of the *Mitchell* court: discriminatory motive can be, and frequently is, an element of a crime without violating the First Amendment.

For example, in *Gilbert*, 813 F.2d 1523, the Ninth Circuit upheld 42 U.S.C. § 3631 (the Fair Housing Act), against both First Amendment and Due Process challenges. The defendant in *Gilbert* contended that he was indicted under the law by reason of expression alone and that his First Amendment rights were therefore violated. The court held that while application of the statute does turn on the defendant's discriminatory motive as manifested by expression, the statutory requirement of an intent to intimidate prevented the statute from being applied to protected speech. *Id.* at 1529. In other words, the requirement of an underlying criminal intent or act (such as an intent to intimidate or to assault) prevents the law from unconstitutional application.

The Wisconsin Supreme Court's finding that there can be no punishment for discriminatory motive has another effect. If taken to its logical conclusion, the reasoning would invalidate nearly every federal and state antidiscrimination law now in effect. For example, 18 U.S.C. § 245 imposes criminal sanctions where any person "by force or threat of force willfully injures, intimidates or interferes with" federally protected rights where such injury or intimidation or interference is motivated because of the race, color, religion or national origin of the victim. 18 U.S.C. § 245(b). Any person found in violation of this section faces a fine of up to $1,000 or imprisonment of up to ten years, or both. *Id.* And where death has resulted from the violation, imprisonment may be for any term of years or for life. *Id.*

(Mass. App. Ct. 1987) (violent attacks on Cambodian tenants because of their national origin deprived them of rights under federal and Massachusetts law); *Hendrix*, 813 P.2d 1115 (upholding constitutionality of Oregon racial intimidation statute against First Amendment challenge); *Grupe*, 532 N.Y.S.2d at 818 (upholding New York's hate crime statute because: "The statute does not attempt to prohibit bigotry itself. The individual's freedom to think, and indeed, speak, publish, or broadcast views on the subject of race, religion or ethnicity are not regulated by this law. Violent conduct is what is being regulated."); and *Beebe*, 680 P.2d 11 (upholding Oregon's racial intimidation statute against an equal protection challenge based on the notion that the different treatment of criminals who are convicted under the hate crimes statute denied victims of non-racial assaults equal protection of the laws).

Under *Mitchell*'s reasoning, section 245 should also be found unconstitutional. *Mitchell* holds that section 939.645 is unconstitutional because it "punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Mitchell*, 485 N.W.2d at 812 (emphasis added). Under this reasoning section 245, which, like section 939.645 criminalizes discriminatory motive, also violates the First Amendment.

The *Mitchell* court's attempt to distinguish section 939.645 from other antidiscrimination laws ultimately sounds hollow, belying the lack of any such distinction. The court asserts that "[d]iscrimination and bigotry are not the same," and seeks to distinguish between the discriminatory act which is punished by antidiscrimination laws and the "selection," which the court deems to be a mental process protected by the First Amendment. *Id.* at 816. It repeatedly attempts to argue that antidiscrimination laws punish and seek to deter "objective acts" of discrimination whereas hate crimes laws punish not objective acts but rather subjective mental processes. *Id.* This reasoning neglects the critical fact that section 939.645 *cannot* operate unless and until a defendant *acts* (*i.e.* until a defendant violates another criminal statute discriminatorily).

Further, this Court's decision in *R.A.V.* clearly rejects the reasoning adopted by the *Mitchell* court and explicitly makes note of laws, such as Title VII and 18 U.S.C. §§ 241, 242, where the First Amendment is not violated even where words alone evidence a violation of the law. *R.A.V.*, 112 S. Ct. at 2546. While the *Mitchell* court clearly attempts to limit its reasoning to apply only to criminal statutes, the court's condemnation of section 939.645's "because of" language undoubtedly implicates all laws which protect certain classes of persons. Justice Bablitch states this concisely in his dissent in *Mitchell*: "Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts 'because of' the victim's protected status." *Mitchell*, 485 N.W.2d at 820 (Bablitch, diss.).

Civil rights laws since the Reconstruction Era have recognized the need to protect and enforce the rights of certain identifiable classes of persons *because of* their membership in those classes of persons. These laws make otherwise legal acts illegal when the motivating factor behind the acts is discrimination against an

individual or group of individuals because of their class membership.[28]

The *Mitchell* court's attempt to distinguish between antidiscrimination statutes like Title VII and the hate crimes statute it strikes down as unconstitutional is intellectually dishonest.[29] These statutes, like section 939.645, punish conduct that is motivated by a desire to discriminate. Just as a Title VII employer's discriminatory "thoughts" are not protected by the First Amendment, neither are a Wisconsin criminal's.

The *Mitchell* court also errs by finding that the Wisconsin statute is overbroad and thereby chills protected speech. Again, the *Gilbert* case is instructive. After noting that application of the overbreadth doctrine is "strong medicine" to be sparingly applied, especially as to statutes regulating conduct, the Ninth Circuit concluded in *Gilbert*,

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[28] Federal civil rights statutes have long made it illegal to discriminate against persons because of their membership within an identifiable class. For example:

Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, makes it unlawful for any person to discriminate "because of race, color, religion, sex or national origin" in the terms or conditions of the sale, rental, or financing of housing;

Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, guarantees that all persons be entitled to the full and equal enjoyment of public accommodations without discrimination or segregation "on the ground of race, color, religion, or national origin;"

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, makes it illegal for any person in the United States to be excluded from participation in or denied the benefits of a federal program or activity "on the ground of race, color, or national origin;"

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful to discriminate in employment practices against a person "because of such individual's race, color, religion, sex or national origin."

[29] As Justice Bablitch asks in his dissent:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?

Mitchell, 485 N.W.2d at 820.

> Section 3631 on its face regulates conduct, although expressive speech may also be implicated. The possibility of the statute's reach into substantial, impermissive [sic], protected activity appears remote. When a statute may deter protected speech only to some unknown extent, we cannot justify invalidating the statute and thereby prohibiting the government from regulating conduct within its power to proscribe.

813 F.2d at 1531 (citations omitted). This language in *Gilbert* presages this Court's opinion in *R.A.V.* The Court in *R.A.V.* similarly refused to cloak discriminatory conduct with First Amendment protection simply because that conduct conveys an idea or philosophy. *R.A.V.*, 112 S. Ct. at 2546. The *Mitchell* court's overbreadth theory, as well as its reasoning which outlaws the future use of motive, has no merit.

This Court should reject the Wisconsin Supreme Court's application of *R.A.V.* to an act of pure discrimination. The *R.A.V.* decision expressly prohibits its application to a case such as Respondent's. *Mitchell* provides, if anything, a telling example of the anomalous and insupportable results that will follow a court's misapplication of *R.A.V.* to enhancement statutes such as Wisconsin's section 939.645.

V

CONCLUSION

For the foregoing reasons, the Court should reject the *Mitchell* court's application of the First Amendment to section 939.645. Section 939.645 does not implicate, let alone violate, the rights accorded individuals under the First Amendment. To find otherwise ignores and indeed rejects the clear import of a multitude of state and federal laws prohibiting discrimination. Therefore, the Wisconsin Supreme Court must be reversed.

DATED: January 28, 1993

Respectfully submitted,

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APPENDIX

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JURISDICTIONS WITH HATE CRIMES STATUTES SIMILAR TO SECTION 939.645

The following jurisdictions have enacted enhancement statutes similar to Wisconsin's:

California (Cal. Penal Code §§ 190.2, 422.7, 422.75 (West 1992)); Florida (Fla. Stat. Ann. § 775.085 (West 1992)); Maryland (Md. Ann. Code art. 27, § 470A (Michie 1992)); Minnesota (Minn. Stat. Ann. § 609.2231 (4) (West 1992)); Montana (Mont. Code Ann. § 45-5-222 (1991)); New Hampshire (N.H. Rev. Stat. Ann. § 651:6 (1991)); New Jersey (N.J. Stat. Ann. § 2C:44-3 (West 1992)); Utah (Utah Code Ann. § 76-3-203.3 (Michie 1992)); Vermont (Vt. Stat. Ann. tit. 13, § 1455 (1991)).

The following jurisdictions have criminalized acts of hate violence as an independent crime:

California (Cal. Penal Code § 422.6 (West 1992)); Colorado (Colo. Rev. Stat. Ann. § 18-9-121 (West 1992)); Connecticut (Conn. Gen. Stat. Ann § 53a-181(b) (West 1992)); District of Columbia (D.C. Code Ann. §§ 22-4001-4004 (1992)); Idaho (Idaho Code § 18-7902 (1992)); Illinois (Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd 1992)); Iowa (Iowa Code Ann. § 729.5 (West 1992)); Massachusetts (Mass. Gen. Laws Ann. ch. 265, §§ 37, 39 (West 1992)); Michigan (Mich. Comp. Laws Ann. § 750-147b (West 1992)); Missouri (Mo. Ann. Stat. §§ 574.090, .093 (Vernon 1992)); Nevada (Nev. Rev. Stat. Ann. § 207.185 (Michie 1991)); New York (N.Y. Penal Law § 240.30-.31 (McKinney 1984)); North Carolina (N.C. Gen. Stat. § 14-401.14 (1992)); North Dakota (N.D. Cent. Code § 12.1-14-04 (1991)); Ohio (Ohio Rev. Code Ann. § 2927.12 (Anderson 1992)); Oklahoma (Okla. Stat. Ann. tit. 21, § 850(A) (West 1993)); Oregon (Or. Rev. Stat. Ann. §§ 166.165 (Butterworth 1990)); Pennsylvania (18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)); Rhode Island (R.I. Gen. Laws § 11.42-3 (Michie 1981)); Washington (Wash. Rev. Code Ann. § 9A.36.080 (West 1988)); West Virginia (W. Va. Code § 61-6-21 (Michie 1992)).

Excerpts from *Freedom From Fear—Ending California's Hate Violence Epidemic*, Final Report of the Lieutenant Governor's Commission on the Prevention of Hate Violence (May 1992).

INTRODUCTION: HATE VIOLENCE IN CALIFORNIA

In examining the issue of hate violence in California, the Commission on the Prevention of Hate violence has considered the definition of hate violence to be that established by the April 1986 report of the Attorney General's Commission on Racial, Ethnic, Religious and Minority violence:

> ". . . any act of intimidation, physical harassment, physical force or threat of physical force directed against any person, or family, or their properly or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution or the laws of the United States or the State of California whether or not performed under color of law."

At its most fundamental level, hate violence is an aggressive expression of hatred against another person or group of people simply because of who and what they are. But an act does not have to be criminal to be an act of hate; the use of an epithet with the intent to cause fear is an expression of hate regardless of whether or not it is a crime. Thus, we have chosen to use the term "hate violence," encompassing both explicitly criminal acts and acts of hate which we also seek to prevent.

Our focus on this issue is a direct response to a perceived need. Hate crimes are at an all-time high in California; violent attacks on individuals because of their race, religion or sexual orientation are taking place every day.

The Anti-Defamation League of B'nai B'rith (ADL) reported a 34 percent rise in attacks and threats against Jews in California during 1991. The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them in the same

year. Also in 1991, the National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473—an 11 percent increase—reported in San Francisco by Community United Against violence.

In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the LA County region, a 22 percent increase over 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish targets, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.

This March 1992 report also noted a disturbing trend—a marked increase in physical assaults over other manifestations of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.

Nowhere was the escalation of violence clearer than in the case of incidents directed at gay and lesbian targets. Physical assaults made up fully 69.2 percent of the sexual orientation incidents, and the number of physical assaults against lesbians and gay men (117) nearly matched the total of physical assaults against all other groups combined (130).

With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence and continue to be the favored targets of organized hate groups throughout the state and the nation. Latinos have also been a major target, particularly here in California with its large and growing Latino population. There is a widespread view supported by anecdotal evidence that violence directed against Latinos at or near the California-Mexico border has increased sharply in recent years.

Asian Americans have suffered increased levels of violence directed at them as the economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. The 50th Anniversary of the attack of Pearl Harbor also generated threats and harassment of organizations like the Japanese American Citizens League. Arab Americans were victimized by numer-

ous attacks, threats and vandalism before, during and after the Persian Gulf War of 1991.

Each of these findings is supported both by existing studies of hate violence and by massive anecdotal evidence collected through law enforcement records, community groups and the news media.

We characterize these trends, we think not over-dramatically, as an epidemic of hate violence. For the past three years, reports of incidents have risen steadily and substantially. There is some credibility to the argument that some of this rise represents increased awareness and willingness to report incidents. But it is also clear that an upsurge of violence and hatred is occurring and having a daily impact on the lives of Californians throughout the state.

WHAT CAUSES HATE VIOLENCE?

The roots of hate violence are broad, but most causes come back to one element in the end: *fear*. This fear is most often rooted in ignorance: fear of the unknown, fear of the "other," fear of perceived competitors; all of these hold the potential to generate a violent reaction under the right conditions.

And those conditions are present in California today. The steadily increasing diversity of California's population, and the economic downturn and increased unemployment of the last two years has strongly influenced the increase in hate crimes during that same period. The fact that no single ethnic group will constitute a majority of California's population by the year 2000 has not gone unnoticed. With unemployment running around 8 percent during all of 1991, and surging as high as 8.7 percent in February 1992, the temptation to look for scapegoats has increased.

"US" AND "THEM": THE NATURE OF PREJUDICE

Prejudice is, at a basic level, instinctual. Many studies have been conducted to show that people habitually, instinctually are drawn to notice differences and similarities between themselves

and others. This is a natural function of our desire to create order out of the chaotic world around us.

But in comparing ourselves to others, we tend to label others' similar attributes to be desirable, and others' dissimilar attributes undesirable. Soon we are judging whether a person is "good" (that is, we react positively to them), or 'bad' (we react negatively). It is only a short jump for a stressed person from thinking "that person is bad because they are different from me" to "those people caused all my problems, and I'm going to do something about it." (This discussion of prejudice draws heavily on the work of Dr. Norman Miller of USC and Dr. Marilyn Brewer of UCLA, who have done a number of studies of prejudice, how it is formed and how it can be broken down. Dr. Miller was a presenter at the Commission's January 7, 1992, hearing.)

EXTERNAL INFLUENCES: HATE GROUPS, TRADITIONAL AND PSEUDO-MAINSTREAM

In terms of external causes, the efforts of groups such as the Ku Klux Klan, the White Aryan Resistance (WAR) and other neo-Nazi organizations to preach violence against racial, religious, sexual and other minorities continue unabated today. They have hate hotlines, computer bulletin boards, hate propaganda distribution networks, youth groups, street gangs, etc. active throughout the state, pumping out a steady drone of messages designed to transform the fears of the economically distressed, the paranoid and the ignorant into violent reaction. WAR, in particular, has been adept at indoctrinating and training gangs of young skinheads to brutalize minorities and vandalize their property.

These groups recognize very clearly the psychology of the issues they raise. As former WAR youth leader Greg Withrow told the Commission referring to his upbringing by his neo-Nazi father, "before I ever learned to hate, I learned to fear." They are indoctrinated to believe that minorities are a threat to their way of life, to their very existence, and that the only choice is to fight back in as violent a fashion as possible.

Yet, the efforts of these hardcore white supremacist groups ultimately reach only a few sympathetic ears on the fringes of American society.

What is more disturbing and potentially dangerous is the increasing proliferation of pseudo-mainstream hate groups like David Duke's National Association for the Advancement of White People. Duke and others of his ilk do everything possible to look, act and sound like standard interest groups simply promoting their views about society. But their messages are riddled with innuendo and code words designed to play on people's worst fears and prejudices in order to generate hatred against the people these groups perceive to be their enemies. For example:

—The homophobic preachings of some self-proclaimed watchdog groups like the Traditional Values Coalition spread an insidious message of hate. Their adoption of loaded terms to mask or even justify their virulent hatred of gay and lesbian people has made their views acceptable for some political leaders and small subgroups of the general population.

—Ethnically based groups like the National European American Society (NEAS) and the Irish Task Force purport to be simple ethnic pride organizations, but attack U.S. civil rights laws and immigration policies as "pure genocide" against European Americans. When provoked, they revert to true form and call people of similar ethnic backgrounds who disagree with their views "race traitors" and the like. Not all European-American groups are fronts for white supremacy; some are well-intentioned attempts to mimic other ethnically based clubs and groups. But the term "European American" has been tainted by its use by groups like the NEAS and the White Student Union, an offshoot of WAR.

These pseudo-mainstream hate groups are perhaps the most dangerous. A large percentage of the population automatically tunes out messages from known racist groups like the KKK, because they know who is talking to them and what their true agenda is. But groups with a mainstream cover, who use mainstream terminology and a healthy dose of charged code-words to spread their message, can find a much wider audience.

OTHER KEY EXTERNAL INFLUENCES

1. Peers

Most young people value the opinions of their peers highly. Many young people who have become involved and then left white supremacist groups say they joined because their friends were doing it or because they wanted to belong to a group—any group. The relative void of an American culture when compared to rich cultures like Mexican, Jewish and others may be a part of the psychology at work. Joining a racist gang - or any other gang - fulfills the need to belong. In the case of a racist gang, joining may additionally meet the desire to lash out at others who have a strong ethnic, cultural, religious or even sexual identity.

2. Family

Family may also exert a strong influence on attitudes regarding other people. Former WAR youth leader Greg Withrow told the Commission: "My father's expressed ideal for me was to lead a youth movement; to be as a Hitler . . . I was raised in Nazi camps, I was raised with this philosophy from childhood. I knew nothing else." Raised under these extreme circumstances, it is hard to imagine another outcome for Mr. Withrow than what occurred: heavy involvement with Aryan youth gangs and a career of several years as a WAR youth leader. While Mr. Withrow's experience represents an extreme, many young people in California and throughout the country are exposed to parental or other familial prejudices in the course of day-to-day living. These attitudes coming from important role models will inevitably affect how they view others.

A related issue is the new economic realities of the family. Kids today are the first generation in this century to know that they are unlikely to improve on the standard of living their parents enjoy. For many of them, this has darkened their outlook on life and nurtured a feeling of victimization which may in extreme cases demand some kind of retaliation.

3. Media

The mass media play a key role in shaping popular attitudes, especially among young people. The vast majority of young people today watch several hours of television per day, much of it unsupervised by parents. The portrayals, or lack of portrayals, of various types of people on the programs they watch inevitably shape their attitudes about those groups.

This is especially true in homogeneous neighborhoods where students may have virtually no firsthand exposure to people of a different background. In such case the only information a young person may have with which to form an opinion about a group of people is what they see on television, in the movies or in popular music. If stereotypes or negative portrayals of members of a group are all they see, they are likely to adopt negative preconceptions about members of that group.

4. Political Leaders

Some political figures today are willing to fan the flames of bigotry in order to advance their own interests and careers. We have seen rampant examples in recent years of political campaign ploys that are permeated with racist and homophobic connotations. The appearance that political figures and even some government leaders approve of these views gives them a veneer of respectability that they do not deserve. Young people who see leaders using these kinds of tactics and drawing a following may conclude that there is nothing wrong with race-baiting or gay-bashing.

CONCLUSION

Given the multiplicity of sources and the instinctual nature of prejudice, when addressing hate violence, we cannot afford to focus more than a small portion of our efforts on responding directly to specific sources of negative messages. We have to focus most of our efforts on the broader goal of inoculating the next generation so that they can reject those who try to infect them with hatred for others.

RESPONSES TO HATE VIOLENCE

INDEPENDENT/COMMUNITY-BASED RESPONSES-AWARENESS AND ACTIVISM

The documented increase in hate violence over the past ten years had been paralleled by—and sometimes, confused with—the growth in awareness of the problem. Increased record-keeping and community outreach by local organizations and law enforcement authorities has undoubtedly generated an increase in the reporting of hate incidents. However, based on the vast and steady increase in reports and the close relationships in time between events like the Persian Gulf War and Arab-bashings, and protests over the veto of AB 101—the gay and lesbian anti-discrimination bill—and gay-bashings, it seems unquestionable that there has been a very real increase in incidents.

We are able to document this in large part due to the efforts of a number of dedicated local and statewide organizations devoted to monitoring and activism around issues of human rights. Major groups who regularly report statistical summaries of incidents of hate violence include:

Group	Target Groups for Which Incidents Recorded	Region Covered
Anti-Defamation League	anti-Semitic	statewide & nationwide
Community United Against Violence	anti-gay/lesbian	San Francisco
Intergroup Clearinghouse	all	San Francisco
Klanwath	all	nationwide
LA County Human Relations Commission	all	Los Angeles County
LA Gay & Lesbian Community Services Center	anti-gay/lesbian	Los Angeles area
National Gay & Lesbian Task Force	anti-gay/lesbian	nationwide

Many community groups collect information on an informal basis through walk-in and telephone reports from victims. Some have banded together to create informal community-wide reporting and response networks. In addition, some local government-sponsored human relations commissions are beginning to attempt collection of regional statistics in the same manner LA County has done for the past 12 years.

But despite the positive efforts of all of these private groups, there is still a huge void in the area of recording incidents of hate violence.

State Senator Diane Watson sponsored legislation in 1989 to initiate the statewide collection of hate crime statistics by the Attorney General (AG). However, during the legislative process the bill, SB 202, was amended to make implementation of the collection activities contingent on funding which was never subsequently granted to the AG. Senator Watson has introduced legislation this session—SB 383—to fund that mandate.

At the federal level, the 1990 Hate Crimes Statistics Act (H.R. 1048, authored by Rep. John Conyers, D-Michigan) established a federal monitoring and data collection program. This program is not yet up and running, however, in part because it did not provide any details regarding how the U.S. Attorney General is to "acquire data" regarding hate crimes.

The media have helped to raise public awareness of the problem of hate violence by covering the efforts of local groups to record and respond to hate violence. In a number of cases, media attention has been a key to generating public outrage regarding an incident and support for the victims. It should be noted, however, that *how* the media choose to cover an incident can have a significant effect on the postscript to the incident. Coverage which emphasizes the community's response and support for the victims can have a very positive effect on the community and deter further incidents. Coverage which focuses solely on the victimization of the target can lead to copycat incidents.

STATE GOVERNMENT RESPONSES—PENALTIES AND PREVENTION

State government has been paying increased attention to the issue of hate violence over the past few years, both because of increased incidents and publicity and because of the work of community groups and a few statewide groups working on the issue. There have been numerous pieces of legislation attempting to respond to the problem, with a variety of approaches being taken.

The most significant recent legislative measure dealing with penalties for hate crimes was Senate Bill 98, the Hate Crimes Act of 1991, authored by State Senator Bill Lockyer and sponsored by Lieutenant Governor Leo McCarthy. Senate Bill 98 doubled criminal penalties for hate crimes, increased the potential civil penalty for hate crimes from $10,000 to $25,000, and removed the cap on punitive damage awards resulting from civil suits against hate crime perpetrators. The latter provision will allow plaintiffs in state courts to receive awards like that granted in an Oregon federal district court to the family of a victim of one of Tom Metzger's murderous skinhead gangs.

Several other pieces of legislation dealing with various aspects of the law covering hate violence were also passed during the 1991 session.

Assembly Bill 1009 (Roybal-Allard) added gender to the categories of motivation which indicate a hate crime. A complicating factor in making this change, however, has been the lack of an agreed-upon definition of gender-based hate crime, making it problematic for groups seeking to collect data to determine which crimes to include as gender-based (for example, sexual assault and domestic violence). Assembly Bill 1169 (Lee) removed the requirement that a victim of prejudice-based harassment legislation show a consistent "pattern and practice" of such harassment before qualifying for court-ordered injunctive relief. Assembly Bill 1094 (Polanco) required the governing authorities of the University of California and the California State University system to require campus law enforcement officials to collect and report data regarding incidents of hate violence on UC and CSU campuses.

In addition, Assemblywoman Barbara Lee introduced and moved through the Legislature the California schools Hate Violence Reduction Act, AB 1945. The bill required the State Board of Education to implement hate crimes reporting in schools, revise curriculum guidelines to emphasize further human relations education, and create guidelines for teacher and administrator in-service training to promote nondiscriminatory attitudes and practices. The Governor vetoed AB 1945, but it has been reintroduced this year in somewhat similar form as AB 2755.

Assemblywoman Lee's legislation is directed at an area which has not seen much legislative activity in the past—*the prevention of hate violence*. While it is important to establish through appropriate sanctions the fact that society will not tolerate acts of hate violence and will punish them significantly, we as a Commission come to the problem from the angle of trying to find effective ways to prevent hate violence from occurring in the first place.

A NEW RESPONSE: THE COMMISSION ON THE PREVENTION OF HATE VIOLENCE

Despite a number of studies, attention from groups like Governor Brown's Commission on Civil Rights and Attorney General Van de Kamp's Commission on Racial, Ethnic, Religious and Minority Violence, and the work of Assemblywoman Lee to address the schools component, the key area of targeting young people with efforts to prevent hate violence had not been comprehensively explored prior to the establishment of this Commission.

The Commission grew out of Lieutenant Governor Leo McCarthy's work with the Coalition of human rights organizations and individuals supporting passage of SB 98. While there was agreement on the need for strong penalties to send a message that hate violence is unacceptable, the Lieutenant Governor and many supporters of SB 98 recognized that this was only half the answer to the problem.

The other half was prevention—working to stop hate violence before it starts.

The Commission was established by Lieutenant Governor McCarthy in September 1991, and is made up of a broad coalition of community leaders, educators, legislators and law enforcement officials from around the state. Our joint purpose is to meet the need for creative solutions to the problem of hate violence that go beyond punishing it. These goals are elaborated upon in the next section.

COMMISSION GOALS

The Lieutenant Governor's Commission on the Prevention of Hate Violence defined its goals in the context of the experience many of the members had working for passage of SB 98. Having focused previously on expanding punishment for acts of hate violence, we chose to explore ways of preventing these acts from occurring.

We know that attitudes about people are formed easily at a young age and changed later in life with increasing difficulty. We also know that the vast majority of hate crimes are in fact committed by males under the age of 25. So our focus was on reaching youth.

As defined early on by the Commission membership, the goals of the Commission were:

- to refocus the issue of hate crimes in the direction of educational measures aimed at preventing future hate crimes;
- to develop innovative ways of reaching young people throughout the state with a message promoting tolerance of and appreciation for the diversity of our population, using everything from classroom education to mass media messages to community-based awareness programs for local leaders, educators and law enforcement officials;
- to work with practitioners in each of these key arenas to provide the practical grounding these innovations will need to be brought into play;
- to develop a menu of initiatives for state and local actions, both legislative and administrative, which will allow the state to meet the above goals; and, ultimately
- to create the foundation for a future emphasis on preparing the California leaders of tomorrow in all aspects of education for the diversity which they will discover is both their biggest challenge and greatest treasure.

The Commission sought to fulfill these goals by defining an agenda including meetings focusing on programs aimed at the

school environment, programs for youthful hate crime offenders, community-based programs aimed at preventing hate violence, and the role of the mass media in shaping popular attitudes. In each case, program directors, community leaders, and other experts on hate violence were asked to speak to the Commission and participate in questioning and discussion of the issues. The next section provides brief summaries of each of the five meetings convened by the Commission.

COMMISSION MEETING SUMMARIES

The following are short summaries of each of the Commission's five meetings, including a description of the agenda, the speakers in attendance, and the discussions which took place. For those interested in seeing more in-depth records of the meetings, detailed minutes for each of the Commission's meetings are available from the Lieutenant Governor's Sacramento office for a nominal fee covering printing and postage.

SEPTEMBER 24, 1991
COUNTY WATER & POWER BUILDING
LOS ANGELES
INTRODUCTION AND OVERVIEW

The Commission's first meeting focused on conducting an initial discussion of the issues, determining the overall goals and direction of the Commission, and sketching out agendas for subsequent meetings.

Four commission members were asked to give presentations to the group to help frame the issues: James McElroy, co-counsel in 1990's successful multi-million dollar lawsuit against the White Aryan Resistance; Brenda Steppes, principal of Hancock Park Elementary School, one of the most ethnically diverse elementary schools in the state; Fred Persily, independent human relations specialist and a consultant to the now-defunct Attorney General's Commission on Racial, Ethnic, Religious, & Minority Violence; and Ron Wakabayashi, executive director of the Los Angeles City Human Relations Commission, a leading community-based organization combating hate violence.

In the course of the discussion, the Commission identified four key issue areas for further exploration: the vital role of the school environment, the need for programs for youthful hate crime offenders, the growing role and effectiveness of community-based programs, and the extraordinary power of the mass media to influence youth. These four topics became the themes of the four commission meetings which followed over the next six and a half months.

NOVEMBER 18, 1991
OAK PARK COMMUNITY CENTER
SACRAMENTO
PROGRAMS & POLICIES IN THE SCHOOL ENVIRONMENT

At the November hearing the Commission heard from two panels of witnesses regarding the role of the school environment in shaping young people's attitudes toward others, and existing programs to combat prejudice and hate violence in California schools.

The first panel included Rodney Atkinson, a consultant with the Department of Education unit overseeing History/Social Sciences curriculum; Cynthia Esty, Northern California project coordinator for "A World of Difference," a classroom anti-bias curriculum developed by the ADL; and Dr. Virginia Uribe, founder of Project Ten, a high school campus-based counseling and support group for lesbian and gay teens. Discussion focused on the need for curriculum to be inclusive of all segments of the population and the difficulty in balancing the desire to see school districts utilize the state's very positive curriculum guidelines against the system's emphasis on local control.

The second panel included Assemblywoman and Commission member Barbara Lee, author of AB 1945, the California Schools Hate Violence Reduction Act; Fred Persily, author of "The Diverse Student Education Project," a proposed teacher training curriculum for the California Teachers Association, and Terry Amsier of the Community Boards, a national on-campus conflict resolution organization. Discussion focused on issues such as:

opposition to AB 1945 from supporters of "traditional values;" how to target new teachers and current teachers for diversity training; and the uses of conflict resolution programs like Community Boards.

JANUARY 7, 1992
UNIVERSITY SYNAGOGUE
LOS ANGELES
YOUTHFUL OFFENDERS/UNLEARNING PREJUDICE

The third Commission meeting brought extensive testimony from Greg Withrow, a former skinhead, former member of the White Aryan Resistance, and former leader of that group's youth recruiting network. Mr. Withrow gave a compelling account of his upbringing by a father devoted to Nazism, his deep involvement with WAR and its youth wing, and his eventual departure from the white supremacist movement and acceptance of others. He spoke at length about the philosophical underpinnings of racism, its appeal to young people, and what factors can lead them into hate groups or steer them away from racism.

The Commission engaged Mr. Withrow in a discussion of the psychology of racism and how we can either inoculate people against it or draw them away once they have become involved. He stressed the importance of exposing young people to diversity to reduce the fear of the unknown, and suggested that alternative sentencing may be productive in giving young hate crime offenders an opportunity to learn about their victims and why they need not fear them.

The second panel focused on methods of "unlearning" prejudice that may be applicable to youthful hate crime offenders, and included Ed Wilder, assistant deputy director for institutions and camps of the California Youth Authority, and Dr. Norman Miller of the University of Southern California.

Mr. Wilder provided an overview of the CYA's handling of hate crime offenders, noting that they are not singled out for any special attention or programs but go through the same process of group and solo counseling designed to address the crime for which they were sentenced. Dr. Miller reviewed his extensive research

into teaching methods that break down our tendencies to group ourselves with those we resemble and against those who are dissimilar. Discussion focused on CYA counseling and staff training procedures and the practical applications of Dr. Miller's research to classrooms and youth facilities.

FEBRUARY 24, 1992
JAPANESE AMERICAN CITIZENS LEAGUE
SAN FRANCISCO
COMMUNITY-BASED APPROACHES TO PREVENTING HATE VIOLENCE

The San Francisco meeting featured representatives from two local government-sponsored, community-based comprehensive anti-hate violence programs: the San Francisco Hate Violence Reduction Plan and the Alameda County Hate Violence Prevention Plan.

The first panel included Ron Dudum, co-chair of the Intergroup Clearinghouse, a San Francisco-based coalition of community groups working with city agencies and community organizations to implement its plan; Linda Davis, deputy superintendent of the San Francisco Unified School District; and Officer Sandi Bargioni of the San Francisco Police Department's Hate Crimes Unit. Each discussed the components of the plan and the extensive cooperation and coordination between public and private agencies with widely varying jurisdictions and missions. The Commission's subsequent questions and discussion focused on the importance of building a relationship of trust between community groups and local government authorities, reporting and personnel training issues, and funding.

The second panel consisted of Vince Reyes, a Commission member and multicultural multilingual coordinator for Alameda County, and Michael Wong, aide to Alameda County Supervisor Don Perata. Mr. Reyes and Mr. Wong were two of the principal authors of Alameda County's plan, and they reviewed briefly its components and progress toward implementation. Their presentation and the pursuant discussion focused substantially on the need

to make human relations programs a budget priority for all levels of government.

APRIL 2, 1992
LOS ANGELES GAY & LESBIAN COMMUNITY
SERVICES CENTER
LOS ANGELES
ROLE OF THE MASS MEDIA

The final meeting of the Commission had as its theme the vital role the mass media play in shaping young people's—and society's in general—attitudes regarding others.

Presenters to the Commission included Norman Fleishman, an independent media consultant working to bring important social issues into regular entertainment media; Richard Jennings, executive director of Hollywood Supports, an entertainment industry group dedicated to positive industry treatment of gay and lesbian people; and Henry Bromell and Kevin Arkadie, executive story editor and story editor of "I'll Fly Away," a weekly NBC television program focusing on race relations in the deep South in the early days of the civil rights movement.

Each presenter acknowledged the tremendous power the media have to influence social mores, set standards and project value judgments to the general population. The discussion between the Commission and the panel focused on methods to encourage better portrayals and better programming in general without encroaching on free speech. There was a consensus that a positive approach had the greatest potential to succeed.

FINDINGS AND RECOMMENDATIONS

1. LEADERSHIP/AWARENESS

During its five meetings, the Commission's discussions repeatedly returned to the role government officials and other community leaders play in setting the public agenda and shaping the public's perceptions of issues. In recent years many political leaders have employed charged terms to play on public fears for

their own short-term political gain. Some have gone as far as manipulating images in television commercials in order to provoke a response. Powerful images of white workers losing jobs to minority applicants and extreme depictions of gay and lesbian people designed to shock middle American sensibilities are just two examples of this dangerous phenomenon.

Leaders today need to have the political will to devote scarce resources to preventing and responding to hate violence. The Commission heard testimony expressing frustration with the resistance of the California Attorney General to reallocate expenditures to implement legislation calling for the collection of hate crime reports from all California law enforcement agencies. In addition, the Commission heard testimony that the federal Hate Crime Statistics Act does not mandate local police departments to identify and report hate crimes. Therefore, neither California nor the federal government can provide accurate information on the level of hate violence, the groups affected and the areas of the state in most need of attention.

Recommendations:

1. Political and other leaders in society need to set a responsible example by refusing to resort to the use of racist, anti-immigrant, anti-Semitic and homophobic ploys for political gain. Tolerance and respect for human diversity are the fundamental values upon which this nation was founded.

2. Legislation should be enacted requiring law enforcement agencies and schools to report incidents of hate violence.

3. The California Legislature and the Governor need to give state and local programs that prevent and respond to hate violence the same priority for funding given to institutions that incarcerate perpetrators of hate crimes.

4. The Commission should, by letter accompanying a copy of this report, strongly urge all major officeholders and candidates for major office in California to speak out regarding the rise of hate violence in our society, identify what they believe to be the causes of this phenomenon, and how they propose to respond to it.

5. The Commission should, by letter accompanying a copy of this report, urge local governments throughout California to recognize and publicly acknowledge and address the problem of hate violence in their community.

2. SCHOOLS

Schools, as the point of contact between government and youth, should serve as the key component of public policy to prevent violence motivated by prejudice and bigotry. However, the Commission has heard testimony that:

— Reported incidents of hate violence on school campuses may represent only the tip of the iceberg. Indeed, a Los Angeles County survey of hate violence incidents in a number of LA County schools indicates that more incidents may occur on school campuses than in the community at large;

— Some curriculum and programs currently relied on by schools to "promote appreciation for diversity' may be ineffective in preventing hate violence according to research studies on the formation of prejudice. The Commission received testimony that how teachers teach may be equally or more important in reducing hate violence than curriculum and programs designed to promote tolerance and understanding;

— Teaching staff in California is approximately 80 percent white, while a majority of students are nonwhite; and

— Teachers receive minimal training in bias reduction and conflict resolution techniques in the course of meeting credentialing requirements.

As part of this effort, we must redouble our efforts to solve problems such as class size and school violence and other obstacles that get in the way of teachers reaching out to and communicating effectively with their students.

We also recognize the important role the California State University system must play in helping teachers address these issues, because CSU trains 70 percent of the teachers in the state.

Findings:

1. Schools must take immediate action to monitor and respond to hate violence on the campus.
2. Teachers need to be trained to use cooperative learning techniques that will counter prejudicial attitudes and predispositions to hate violence.
3. Teachers need to be trained to work effectively with students from diverse racial and ethnic backgrounds who speak English with varying levels of proficiency and who have a broad range of educational experience.

Recommendations:

1. Legislation should be enacted to require school districts to record and report incidents of hate violence occurring in public elementary, middle and secondary schools. A sample incident-reporting form used by the San Francisco Unified School District is included as Appendix 3.
2. Legislation should be enacted to require school site committees to be expanded to include students and concerned community residents and to
   a. monitor:
      1) access of students to appropriate areas of the campus regardless of their race, religion, ethnicity, gender, sexual orientation or disability;
      2) access for students to participate in appropriate school activities, clubs, etc., regardless of their race, religion, ethnicity, gender, sexual orientation or disability;
   b. draft and update annually a plan for promoting and improving human relations on the campus;

c. consider the use of conflict resolution programs as one method to prevent bias-related incidents from escalating into hate violence;

d. consider the implementation of "buddy systems" matching new students with more experienced students to help integrate them successfully into the school environment.

3. Minimum standards for the granting of a teaching credential in California should be expanded to require the completion of coursework in:

   a. the causation of prejudice and bias-reduction techniques;

   b. communication with students from diverse backgrounds;

   c. conflict prevention and resolution;

   d. the use of cooperative learning techniques and student-based classrooms to overcome prejudice;

   e. the preparation and presentation of bias-free curricula, including the history, culture and contribution to society of all the major groups making up the school population.

4. Legislation should be enacted to require every teacher to complete an in-service training program including the elements enumerated in Recommendation 3 above at least once every five years.

5. Diversion, alternative sentencing, and other youth programs driven by the criminal justice system need to include intervention strategies for perpetrators of hate violence.

6. Youth Authority and juvenile probation staff, and juvenile court judges and referees need to identify cases involving hate violence and apply appropriate intervention strategies. Managers of juvenile detention facilities need to implement programs to prevent bias-related

incidents and adopt protocols to identify and respond to acts of hate violence.

Recommendations:

1. Legislation should be enacted to require directors of all youth programs receiving state funds to complete training in preventing and responding to hate violence.

2. The Office of Criminal Justice Planning and the California Youth Authority should sponsor regional meetings of state-funded programs serving youth and offer workshops that include, but are not limited to:

   a. identifying and responding to hate violence;

   b. conflict resolution and other effective interventions for preventing hate violence;

   c. cooperative approaches by community-based programs to intervene with youthful perpetrators of hate violence;

   d. coordinating hate violence intervention activities with criminal justice agencies;

   e. coordinating hate violence intervention activities with schools.

3. The Office of Consumer Affairs should recommend the inclusion of activities designed to prevent and respond to hate violence by dispute resolution programs within their jurisdiction.

4. Workshops on employing effective intervention techniques in alternative sentencing and diversion for perpetrators of hate violence should be offered as part of the continuing education program for judges and juvenile court referees. Legislation should be enacted to require probation officers to receive training in the application of intervention programs for juvenile perpetrators of hate violence.

5. Legislation should be enacted to require the California Youth Authority to require youth detention facilities to

implement programs to prevent hate violence and to adopt protocols for monitoring and responding to bias-related incidents.

6. Legislation should be enacted requiring the court in juvenile hate crime cases to consider, as a sentence component, community service in a setting appropriate to the individual's biases. For example, if the crime manifested prejudice against African Americans and the suggested sentence for the crime is 90 days in a Youth Authority camp, one option might be for the perpetrator to be sentenced to 400 hours (10 weeks) of community service at a public facility in a community which is predominantly African American. This option should be exercised at the court's discretion based on their case-by-case assessment of the probability of a positive outcome from alternative sentencing.

4. COMMUNITY-BASED EFFORTS

Compelling testimony was received indicating that hate violence is inversely proportional to the state of the economy. Unfortunately, this has resulted in the greatest need for mobilizing public and community-based services to prevent and respond to hate violence coming at times when resources are already stretched to their limits. Many existing human relations programs have been under-funded or not funded at all in the most recent fiscal year. If people are to live together in harmony when resources are scarce, public agencies need to place efforts to support programs designed to prevent hate violence at the top of the list of priorities when the economy is declining.

Findings:

A number of communities have developed plans for dealing with hate violence locally. These plans offer useful ideas which can serve as models for local government units up and down the state.

Examples of initiatives taken by local governments and community coalitions around the state include:

- working with local boards of education, teachers and school district staffs on developing in-school prevention strategies;
- training community agencies to take reports of hate violence and refer victims to legal assistance, professional counseling and other services;
- establishing hate crime units in police departments and district attorneys' offices;
- establishing hate crime reporting and victim's assistance hotlines;
- training police officers in identifying and investigating hate crimes; and
- instituting hate crimes reporting in schools.

Further information regarding local programs is provided in Appendix 2—Resource Directory.

Recommendations:

1. Local governments, as well as the California Legislature and the Governor, need to give programs that prevent and respond to hate violence the same priority for funding given to institutions which incarcerate perpetrators of hate crimes. Similar to the area of health care spending, dollars spent now on prevention will save many more dollars in the future that might otherwise have to be spent on incarceration.

2. Local governments should establish close ties of cooperation and information exchange with independent community organizations which address issues related to hate violence. Many effective programs and services are being provided by independent community groups (examples are listed in Appendix 1). Local authorities should identify the groups active in their area and work with these organizations to make the entire community aware of their presence and activities. Cooperative ef-

forts are needed to overcome language and cultural barriers to reach immigrant populations. Public and private resources should be pooled to reach common goals for the community.

3. Legislation should be enacted requiring the Commission on Peace Officer Standards and Training to implement standard police training procedures for basic academy training, field training, and advanced officer and management training with respect to cultural differences and hate crimes.

5. MASS MEDIA

During this last decade of the 20th century, young people learn attitudes and prejudices not just from relatives and friends but also from television, movies, music, newspapers, magazines—the entire range of mass media which bombard them every day. Young people are simultaneously the most attracted to mass media output and the most vulnerable to being influenced by what they see and hear.

Findings:

1. Mass media generally have not been successful in portraying minorities as realistic, well-rounded characters. Stereotyping and invisibility are still very real problems. One study shows that of 569 regular characters on an average week of TV network programming, only 12 were Jewish, 9 Latino, 5 gay or bisexual, 3 Asian/Pacific, 2 Native American and 1 Arab American.

2. The Commission heard testimony describing the media as an institution that has at times promoted attitudes of bigotry and created conditions conducive to the perpetration of hate violence. Providing a public forum for organizations which promote hate violence has helped to give them an aura of respectability.

3. The Commission heard testimony that a resources directory exists for television writers who seek input from certain community organizations when writing about

members of their respective communities. A similar directory for news-gathering organizations could be extremely useful.

Recommendations:

1. Television and cable networks and stations should make a commitment to a periodic (perhaps week-long) focus on diversity and tolerance in their programming, taking their cue from past broadcast and print media collaborations which focus on particular themes and issues, such as drugs, hunger and homelessness. Intergroup relations are a fundamental, universally relevant issue for all forms of programming—drama, comedy, documentaries and the arts. Industry leaders should come together to concentrate on this issue and try to create an event that would motivate the widest possible participation.

2. Programming which is directed specifically at a young audience carries a special responsibility to be sensitive and to present positive values. A good example of the idea noted in Recommendation 1 above is the collaboration last year which resulted in a block of Saturday morning cartoon programs on all three major networks that shared an anti-drug message. We hope this apparent awareness of the need for responsible presentation of youth-oriented material extends to the issues addressed in this report and, further, to a recognition that programming which consistently portrays violence as an acceptable, or even favored, avenue of resolving conflicts promotes physical violence in the real world.

3. Leaders in the broadcast entertainment industry should make a commitment to developing and promoting more quality programs featuring an examination of the issues surrounding diversity and prejudice, especially shows which reach a young audience. Examples of prime time shows in this vein include "I'll Fly Away," "A Different World," "Roseanne," "LA Law," "Northern Exposure," and "Life Goes On"; examples of shows aimed primarily at a young audience include "Sesame Street," "Reading

Rainbow," and the network after-school specials. Another important element that these shows all have in common is their proven ability to entertain and even thrill a large audience without resorting to gratuitous violence.

4. The governing bodies which annually present the Academy Awards, Emmy Awards, Tony Awards and Grammy Awards should each develop a new award, named for a significant entertainment industry figure known for his/her opposition to all forms of prejudice and discrimination, and present it annually to the motion picture, television program, stage production or musical composition which best exemplifies those principles.

5. Community leaders and entertainment industry leaders should support and continue to develop and promote special awards for programming which intelligently and sensitively addresses intergroup relations, issues and understanding. Examples of existing awards of this type include the NAACP's Image Awards and the GLAAD/LA's Media Awards.

6. Many news programs have done an admirable job of exposing the public to the extent and seriousness of the hate violence problem in California, and they deserve praise for their coverage. They should consider providing a service to the public by drawing attention to positive developments in the area of intergroup relations, such as supportive community responses to incidents of hate violence.

7. Individual news organizations should develop resource directories for their reporting staffs to assist them in getting community reactions to and perceptions about issues and incidents, including hate violence, which affect them uniquely.

8. Representatives of the "minority' and mainstream electronic and print media should begin working to develop techniques for reporting intergroup activities and conflicts in a way that would promote harmony rather than division among the population.

6. PENDING LEGISLATION ENDORSED BY THE COMMISSION:

AB 2755 (Lee)	California Schools Hate Violence Reduction Act (1992 version of last year's AB 1945). Requires State Board of Education to adopt policies and guidelines to prevent and respond to acts of hate violence in California schools, including revising state curriculum guidelines, teacher and administrator in-service training programs, and the establishment of a reporting system for in-school incidences of hate violence.
AB 3407 (Klehs)	Requires the Commission on Peace Officer Standards and Training to develop by December 31, 1993, standard police training guidelines and a course of instruction and training addressing hate crimes.
SB 363 (Watson)	Appropriates $132,000 to the Department of Justice to implement existing hate crimes reporting requirements which are currently not being met due to a lack of funding.
SB 1408 (Torres)	Requires the Commission on Peace Officer Standards and Training to implement by July 1, 1993, standard police training procedures for basic academy training, field training, and advanced officer and management training with respect to cultural differences and hate crimes.
SB 1427 (Roberti)	Requires the Department of Justice to develop model programs to assist communities in dealing with hate crimes; requires the Department to develop and implement a hate crimes reporting database.

No. 92-515

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*

v.

TODD MITCHELL, *Respondent.*

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Cal. Penal Code § 190.2(a)(16) (West 1992) 13
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Attorney General's Comm'n on Racial, Ethnic, Religious and Minority Violence, *Final Report* (1986) 13
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Bias-Incited Beating Death of a Vietnamese Stuns a Florida Town, N.Y. Times, Aug. 23, 1992 9
Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) 10
Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, § C, at 1, col. 1 10
L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1990* (1991) 7
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Southern Poverty Law Center, *Deadly Hatred on American Streets*, Klanwatch Intelligence Rep. No. 59 (Feb. 1992) 9

U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* (1992) 5, 6, 8

U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (1990) 5, 6, 12

U.S. Comm'n on Civil Rights, *Recent Activities Against Citizens and Residents of Asian Descent* (1986) . . 6, 9

U.S. Dep't of Commerce, Bureau of the Census, *1990 Census Profile: Race and Hispanic Origin* (1991) . . 5

U.S. Dep't of Justice, Fed. Bureau of Investigation, Press Release, Dec. 22, 1992 8

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In The

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-515

STATE OF WISCONSIN, *Petitioner,*

v.

TODD MITCHELL, *Respondent.*

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The National Asian Pacific American Legal Consortium, American Citizens for Justice, the Asian Law Alliance, Chinese for Affirmative Action, the Chinese American Citizens Alliance, the Committee Against Anti-Asian Violence, the Japanese American Citizens League, the National Asian Pacific American Bar Association, and the Organization of Chinese Americans submit this brief as *amici curiae* in support of petitioner, the State of Wisconsin. Counsel for both parties have consented to the submission of this brief;

letters of consent have been filed with the Clerk of the Court.

The *amici curiae* are organizations dedicated to the protection of civil rights for the Asian and Pacific Islander communities in the United States. All *amici* have advocated for the passage of hate crimes legislation, and are active members of the National Network Against Anti-Asian Violence, a coalition of organizations that monitor and respond to incidents of hate violence throughout the country.

Statements of interest for each organization are contained in Appendix A.

This case raises issues of significant concern to *amici curiae*. Racial violence has become a serious problem throughout the country, and laws that deter and punish anti-Asian violence are of vital importance to *amici* and the individuals they represent. While they are vigorous defenders of civil liberties and the freedom of speech, *amici curiae* believe that legislative efforts such as the Wisconsin penalty enhancement statute are necessary in the fight against racial violence. Violent threats and acts committed because of the victim's membership in a protected class are simply not protected speech.

SUMMARY OF ARGUMENT

Discriminatory violence -- violence committed because of race, national origin, religion, sexual orientation, or other immutable characteristics — has become a serious problem throughout the United States. Violence perpetrated against an individual because of membership in a vulnerable group is an egregious violation of that individual's civil rights, and not only injures the victim, but traumatizes the community to which the victim belongs. Without question, the prevention and punishment of discriminatory violence is a compelling governmental interest.

Hate crimes, which can range from vandalism and property damage to threats, beatings, and killings, are clearly on the rise. Data collected from throughout the country show increases in both the number of crimes committed and the severity of violence. Assaults and homicides perpetrated because of discrimination have become commonplace.

Anti-Asian violence is an especially grave problem. Dramatic population growth, combined with other factors such as the economic hardship in many communities, the fear of economic competition from Pacific Rim countries, and the past participation of the United States in wars on Asian soil, have made Asians and Pacific Islanders particularly vulnerable to acts of violence. Incidents of violence against Asians have risen at a rate faster than for any other ethnic group. Violence has not been limited to individuals and their homes, and has included attacks against businesses, places of worship, and college campuses.

As a response to the upsurge in racial violence, legislatures throughout the country have enacted statutes designed to deter and to punish hate crimes. Hate crimes laws send a special message to law enforcement officials and to the public that certain types of conduct are intolerable. Because an act of violence committed because of bias is more reprehensible than the act alone, many legislatures have enacted penalty enhancement laws, such as the Wisconsin statute at issue, that increase the punishment for violent crimes committed because of race, religion, sexual orientation, and other characteristics.

The Wisconsin Supreme Court erred when it struck down the statute as violative of the First Amendment. The statute does not affect free expression because it punishes violent conduct that is wholly lacking in expressive elements. The lower court misconstrued the statute by attempting to separate the actor's discriminatory intent from the actor's violent conduct. The statute does not punish thought or motive. Rather, it augments punishment because violence was

committed for discriminatory reasons. Like other antidiscrimination laws, the Wisconsin statute forbids certain types of behavior. Just as firing someone from a job, or denying them housing, or preventing them from attending a school may be illegal because it is discriminatory, so to is a violent act that is committed because it is discriminatory.

Even assuming that it affects speech in some way, the Wisconsin statute falls well within this Court's guidelines for valid regulations under First Amendment. The statute is not overbroad, because it merely enhances the punishment for specific types of conduct. Although a defendant's prior statements may be used to determine liability, the statute does not chill speech. It is well established that prior statements, when relevant, may be used to prove an element of a crime.

The statute also satisfies this Court's standards for regulating expressive conduct. The conduct affected by the law is within the power of government to regulate, the law furthers a compelling interest that is unrelated to the suppression of free expression, and the restriction placed on First Amendment freedoms is minimal and certainly no greater than the state's interest in preventing and punishing violence.

Finally, the statute falls well within the guidelines for content-based regulations established in *R.A.V. v. City of St. Paul*. The statute contains no restrictions on expression and is distinguishable from the ordinance in *R.A.V.* because it regulates criminal acts of violence. The Wisconsin law specifically targets violence committed with discriminatory intent and does not have an effect on speech. The Wisconsin hate crimes statute is thus constitutional, and the decision of the Wisconsin Supreme Court should be reversed.

ARGUMENT

I. HATE CRIMES STATUTES PROMOTE THE COMPELLING GOVERNMENTAL INTEREST IN PREVENTING AND PUNISHING DISCRIMINATORY VIOLENCE

A. Discriminatory Violence Against Asians and Other Protected Minorities is a Serious and Pervasive National Problem

Discriminatory violence — violent threats and acts perpetrated against members of certain groups in society — has been occurring with increasing frequency and severity throughout our nation, causing devastating effects on victims, as well as society as a whole. Violence committed because of race, national origin, religion, sexual orientation or other characteristics has become commonplace, and anti-Asian violence in particular has become a widespread and well recognized problem. *See* U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* 22 (1992) [hereinafter *Civil Rights Issues*].

The history of minority groups in this country is replete with overt racism and hostility that have been fanned into individual and mob violence. *See, e.g.*, U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (1990) [hereinafter *Intimidation and Violence*]. As in the past, population growth[1] and overt

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[1]According to the 1990 census, the Asian population more than doubled between 1980 and 1990, making the Asian and Pacific Islander community one of the fastest growing groups in the United States. U.S. Dep't of Commerce, Bureau of the Census, *1990 Census Profile: Race and Hispanic Origin*, at 1, figure 1 (1991) (population increase of 107.8% between 1980 census and 1990 census).

discrimination against Asians[2] have engendered the proliferation of anti-Asian sentiment and resultant violence. *See Civil Rights Issues*, *supra*; U.S. Comm'n on Civil Rights, *Recent Activities Against Citizens and Residents of Asian Descent* (1986) [hereinafter *Recent Activities*].

Many factors have contributed to the increase in anti-Asian sentiment. The United States Civil Rights Commission has identified several causes: (1) racial integration of neighborhoods leading to "move-in" violence; (2) deep-seated racial hatred played upon by organized hate groups; (3) economic competition among racial and ethnic groups; (4) insensitive media coverage of minority groups; and (5) poor police response to hate crimes. *Intimidation and Violence*, *supra*, at 11-19. In addition, the increase in anti-Asian violence can be attributed to the growth in the Asian American population; increasing economic hardship faced by many communities, coupled with retrenchment in government social service programs; the fear of economic competition from Pacific Rim countries; the United States' past participation in military conflicts on Asian soil; and current world events and affairs, including Japan-bashing and the scapegoating of immigrants by public officials and the media. *See Recent Activities*, *supra*, at 29-39.

Whatever the root causes, acts of discriminatory violence,

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[2]Past governmental discrimination against Asians and Pacific Islanders has ranged from anti-Asian court decisions, *see, e.g.*, *People v. Hall*, 4 Cal. 399 (1854) (Chinese and other non-white people prohibited from testifying against whites); *Ozawa v. United States*, 260 U.S. 178 (1922) (Japanese forbidden from obtaining American citizenship), to exclusionary immigration laws, *see, e.g.*, Chinese Exclusion Act, Ch. 126, 22 Stat. 58 (1882); Tydings-McDuffie Act, Ch. 84, 48 Stat. 456 (1934) (limiting Filipino immigration to quota of fifty per year), to the forced incarceration of Japanese Americans during World War II, *see* Executive Order 9066, 3 C.F.R. 1092 (1938-43); *see also Korematsu v. United States*, 323 U.S. 214 (1944).

including acts of anti-Asian violence, are clearly on the rise. In Los Angeles County, for example, from 1989 to 1990, there was a 146% increase in the total number of hate crimes (550 incidents), and a 65% increase in racially based hate crimes (275 incidents). Moreover, there was an increase of 257% (to 49 incidents), or 17.8% of the total, that were directed at Asians. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1990*, at Summary, 2, 7 (1991). From 1990 to 1991, there was a 27% increase in the total number of racially discriminatory hate crimes and a 22% increase in the total number of overall hate crimes, the highest number of acts ever recorded. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1991*, at 1 (1992). Out of a total of 351 racially related hate crimes, fifty-four, or 15.1%, were directed at Asians and Pacific Islanders. *Id.* at 1-2.

The pattern is similar in other metropolitan areas with large Asian populations. In New York City, between January and August of 1990, reported hate crime incidents against Asians showed the highest increase among all ethnic groups, rising from thirteen incidents during 1989 to twenty-eight incidents in 1990. *See* Asian Week, Apr. 5, 1991, at 1. In New Jersey, ninety-two bias incidents against Asian Americans were reported, representing over half of the ethnic bias incidents for the year. N.J. State Police Uniform Crime Reporting Unit, *1991 Bias Incident Report* 6 (1992). A recent report by the Pennsylvania attorney general indicated that the number of reported hate crimes increased 60% between the 1990-91 fiscal year and the 1991-92 fiscal year; hate crimes against Asians increased by over 100%. *See* Moran, *Hate Crimes Increase in Pennsylvania*, Philadelphia Daily-News, Oct. 27, 1992. Nationwide, the Department of Justice reported an increase of 62% in hate crimes perpetrated against Asians within a one year period. *See* Yamauchi, *For Asian Americans, U.S. Climate of 90's is More Hostile*, The Monitor,

May 1990, at 13.[3]

Moreover, reported numbers no doubt undercount the actual number of incidents, because of inadequate and incomplete governmental record keeping. Further, because recent immigrants and refugees comprise a large proportion of the Asian population, many individuals are reluctant to report incidents because of fear, language and cultural barriers, and ignorance of their legal rights. *Civil Rights Issues*, *supra*, at 49-59.[4]

Hate crimes against Asians and other targeted groups have run the gamut from racial slurs and graffiti to beatings, shootings, and killings. *See* Appendix B. For example, in 1982, Vincent Chin, a Chinese American, was beaten to death by two unemployed white auto workers in Detroit, Michigan because the men blamed Chin for the influx of Japanese

[3]Recent statistics compiled by the Federal Bureau of Investigation pursuant to the Hate Crime Statistics Act, 28 U.S.C.A. § 534 (West 1992), reported a total of 4,558 hate crimes in 1991. U.S. Dep't of Justice, Fed. Bureau of Investigation, Press Release, Dec. 22, 1992. Hate crimes against Asians and Pacific Islanders constituted six percent of the total number of incidents, which represents twice the percentage that Asians constitute in the total U.S. population. *Id.* Because 1991 was the first year that statistics were compiled and because data were obtained through independent reports from state agencies, the number of reported incidents is far from complete. Data for Asians and Pacific Islanders are especially lacking because several states, including California, which has forty percent of the country's total Asian population, did not participate in the data collection process.

[4]Recent immigrants are often reluctant to report discriminatory acts of violence to the police not only because of limited English-speaking skills and distrust of police, but also because of fear of retaliation and re-victimization and because of the possibility of jeopardizing their immigration status. Furthermore, many police departments lack sensitivity to the needs of immigrant and refugee populations, lack bilingual staff, and fail to inform victims of their legal rights when crimes are reported. *See Civil Rights Issues*, *supra*, at 49-67.

automobiles and the loss of their jobs. *See Recent Activities*, *supra*, at 43-44. In 1987, Kaushal Sharan was assaulted with a baseball bat by several youth in Jersey City, New Jersey, at a time when local gangs were targeting Asian Indians. In 1989, Patrick Purdy, who had developed a hatred of Southeast Asians because of the Vietnam War, killed five and wounded more than twenty children by firing an assault rifle into a Stockton, California schoolyard. *See Report to Cal. Atty. Gen. John K. Van de Kamp on Patrick Purdy and the Cleveland School Killings* 10-16 (Oct. 1989). In 1989, Ming Hai "Jim" Loo, a Chinese American, was beaten to death in Raleigh, North Carolina, by white men who blamed him for the death of Americans in Vietnam. The men attacked Loo "because they didn't like Vietnamese" and because "their brothers went over to Vietnam in the war, and they never came back." *See* Bailey, *Chinese Man Buried as Friends Express Fear*, Raleigh News/Observer, Aug. 6, 1989, at 23A. On August 21, 1992, a nineteen-year-old Vietnamese student was killed in Coral Springs, Florida after he had attended a party and was taunted with racial remarks about his Asian ancestry. A gang of fifteen men chased him down like a "hunted deer" and beat him to death. *Bias-Incited Beating Death of a Vietnamese Stuns a Florida Town*, N.Y. Times, Aug. 23, 1992.

Increasingly, severe forms of discriminatory violence, including assaults and killings, have taken place throughout the country. According to data from Los Angeles County, assaults have now overtaken graffiti as the primary form of hate violence; for the first time in the twelve years of reporting within the County, there were two racially related homicides in one year. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1991*, at 5 (1992). According to Klanwatch, a project of the Southern Poverty Law Center, there were a record twenty-five racial murders nationwide in 1991, the deadliest year in its eleven-year history of tracking hate crimes. Southern Poverty Law Center, *Deadly Hatred on American Streets*, Klanwatch

Intelligence Rep. No. 59, at 19 (Feb. 1992). Klanwatch also noted a significant increase in discriminatory assaults, acts of vandalism, and cross burnings; California and Texas led the nation with five hate murders each. *Id.*

A recent article revealed that scientists have found that hate crimes are "far more lethal than other kinds of attacks, resulting in the hospitalization of their victims four times more often than is true for other assaults. . . . Half [of the bias incidents] involved assaults. Of these, the victims were injured in 74 percent of the cases; the national average for injury to an assault victim is 29 percent. More telling, at least one victim required hospitalization in 30 percent of the prejudice-based assaults, while for other assaults the average rate of injuries that severe is 7 percent." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, § C, at 1, col. 1.

Furthermore, violence perpetrated against a person because of membership in a vulnerable group not only affects the victim, but traumatizes the community to which the victim belongs. *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2335-41 (1989); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 135-36 (1982). In *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992), in which the Oregon Supreme Court upheld the constitutionality of the state's intimidation statute, the court aptly summarized the problem:

> [C]ausing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes — because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a

> member — invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.

Without question, violence directed against victims because of their immutable characteristics is a particularly egregious violation of their civil rights. Thus, the government's interest in preventing and punishing discriminatory violence committed against Asians and other minorities is an important and substantial one; indeed, as this Court has recently indicated, the government's interest is compelling. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992).

B. Hate Crimes Laws Prevent and Punish Discriminatory Violence

As a response to the growing and widespread problem of discriminatory violence, state and local governments across the country have enacted statutes that monitor hate crimes and prohibit specific acts of violence, intimidation, and coercion. *See* Appendix C; *see also* Anti Defamation League of B'nai B'rith, *Hate Crimes Statutes: A 1991 Report*, at 1-2, 22 (1991); Nat'l Inst. Against Prejudice & Violence, *Striking Back at Bigotry: Remedies Under Federal and State Laws for Violence Motivated By Racial, Religious, and Ethnic Prejudice* 61-65 (1986 & Supp. 1988). The United States Congress has also recognized the gravity of the problem and has passed the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C.A. § 534 (West 1992)), to monitor and collect data on hate crimes at the national level.

Laws that specifically address the problem of discriminatory violence communicate to individuals who would commit acts of violence that the local community or state does not tolerate such acts. These laws also encourage the police to act with particular dispatch in handling discriminatory hate crimes. As the United States Civil Rights Commission has noted: "Effective police responses to incidents of racial and religious violence are necessary to keep such incidents from

spreading. If the police fail to respond, or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret the police activity as official sympathy or even sanction." *Intimidation and Violence*, *supra*, at 17-18.

Penalty enhancement laws, such as the Wisconsin statute at issue, augment the punishment of predicate crimes defined in other criminal statutes when the criminal acts are committed because of discrimination. Section 939.645 provides that the penalty for an underlying crime of violence is increased[5] if the defendant "[i]ntentionally selects the person against whom [the underlying crime] is committed or selects the property which is damaged or otherwise affected by [the underlying crime] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." Wis. Stat. Ann. § 939.645(1)(b) (West. Supp. 1992).

A penalty enhancement statute thus sends an unambiguous message to the public that not only are acts of violence reprehensible but that acts of *discriminatory* violence are particularly egregious and will be punished more severely. Without the penalty enhancement, the legislature sends a message that discriminatory acts of violence cause no greater harm than nondiscriminatory acts of violence. As noted earlier, *see supra* Part I.A, discrimination that is manifested through violence is an especially serious harm that affects both victims and society as a whole. Hate crimes statutes such as section 939.645 are necessary tools in the arsenal of

[5]Specifically, section 939.645 increases the penalty for a non-Class A misdemeanor to a Class A misdemeanor penalty (maximum fine of $10,000; maximum imprisonment of one year in the county jail); increases the penalty for a Class A misdemeanor to a felony penalty (maximum fine of $10,000; maximum imprisonment of two years); and increases the penalty for felonies (fine may be increased by up to $5,000; imprisonment may be increased by up to five years). Wis. Stat. Ann. § 939.645(2) (West Supp. 1992).

weapons to combat discriminatory violence because existing statutes have not adequately addressed discriminatory violence. For example, in California, which has one of the most comprehensive statutory schemes addressing discriminatory violence,[6] the initial impetus for the passage of penal code section 422.7, the analogous statute to Wisconsin's law, was the Final Report of the California Attorney General's Commision on Racial, Ethnic, Religious, and Minority Violence. The commission found that "[e]nactment of a comprehensice civil rights statute with criminal penalties and amendments is necessary to effectively deter hate violence. *Existing civil and criminal laws fail to effectively protect the rights of hate violence victims.*" Attorney General's Comm'n on Racial, Ethnic, Religious and Minority Violence, *Final Report* 7 (1986) (emphasis added). Hate crimes laws promote the government's compelling interest in addressing hate crime, and they are a necessary means of deterring future violence and administering appropriate punishment for perpetrators of discriminatory violence.

II. THE WISCONSIN HATE CRIMES STATUTE REGULATES DISCRIMINATORY CONDUCT, NOT SPEECH OR THOUGHT

A. The Wisconsin Supreme Court Erroneously Focused on Motive and Thought Rather than Discriminatory Intent in Interpreting the Hate Crimes Statute

This Court has long held that conduct lacking expressive elements does not enjoy constitutional protection. *Spence v.*

[6]California has at least 18 statutes that deal with discriminatory threats or violence. *See* Cal. Civ. Code § 51.7 (West 1992); id. § 52.1; Cal. Gov't Code § 6254(f)(2) (West 1992); Cal. Penal Code § 190.2(a)(16) (West 1992); *id.* § 258; *id.* § 302; *id.* §§ 422.6-422.75; *id.*. § 594.1; *id.* § 594.3; *id.* §§ 1170.75-1170.85; *id.* §§ 11410-13; *id.* § 11460.

Washington, 418 U.S. 405, 409 (1974). Most clearly, conduct that rises to the level of violence against person or property is exempt from constitutional shelter: "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 (1982). And, "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection." *Roberts v. United States Jaycees,* 468 U.S. 609, 628 (1984).

The Wisconsin statute in the instant case clearly regulates conduct and in no way implicates the First Amendment. As Justice Scalia stated in his concurring opinion in *Barnes v. Glen Theatre, Inc.*, "the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." 115 L. Ed. 2d 504, 515 (1991) (Scalia, J., concurring).

Nevertheless, the Wisconsin Supreme Court struck down the state's hate crimes penalty enhancement statute as unconstitutional, arguing that the statute punished "motive" and regulated "thought."[7] The court found that the statute "violates the First Amendment directly by punishing what the Legislature has deemed to be offensive thought and indirectly by chilling free speech." *State v. Mitchell,* 169 Wis. 153, 163, 485 N.W.2d 807, 811 (1992). Establishing a distinction between the defendant's criminal act and the defendant's

[7]The Wisconsin Supreme Court's decision is clearly in the minority of state courts that have addressed the constitutionality of hate crimes legislation. The majority have upheld hate crimes statutes such as section 939.645 as constitutional. *See Kinser v. State*, 591 A.2d 894 (Md. 1991); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (1988); *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992); *State v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115 (1991); *State v. Beebe*, 670 Or. 738, 680 P.2d 11 (1984).

motives for committing the act, the Wisconsin court majority found that the statute punished the defendant's biased motives through the sentence enhancement and thus unnecessarily infringed upon his First Amendment rights.

The *Mitchell* court wrongly interpreted the statute by attempting to divorce the physical act of violence from the motivation of the actor. *Id.* at 176, 485 N.W.2d at 817. Focusing on *motive* rather than on the *intent* that attaches to the act of violence completely misdirects the inquiry in evaluating hate crimes legislation. As in other crimes, the actor's motive per se is not an essential element to prove criminal liability for an act of discriminatory violence. A person may attack a member of a racial minority group for any number of reasons: intolerance and xenophobia toward people who are different from oneself, vengeance arising from the effects of economic competition, latent hostility rooted in past military conflict, or simply, overt hatred of another race. However, it is the *intent to commit a violent act against a member of a protected group* that must be examined, not the defendant's motive; in other words, criminal liability rests not on motivation but on proof that the defendant has committed an act of violence *because of* the victim's membership in a protected class.

Correctly focusing on the discriminatory intent of the defendant demonstrates that there is no real difference between a hate crimes statute and another antidiscrimination law that punishes actions based on discriminatory intent. Employment laws punish acts of employment discrimination; housing laws punish acts of housing discrimination; educational laws punish acts of educational discrimination. Hate crimes statutes do no more and no less: they punish acts of criminal discrimination — discriminatory violence.

B. Section 939.645 is Analogous to Other Antidiscrimination Laws that Forbid Discriminatory Treatment

Section 939.645 is clearly an antidiscrimination law.

Penalties may be enhanced when a defendant intentionally selects a victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. Ann. § 939.645(1)(b) (West Supp. 1992). Like other antidiscrimination laws, the penalty enhancement statute expresses the legislative intent that certain groups in society suffer from discrimination and require special protection; therefore, discriminatory acts against individuals who are members — or perceived to be members — of those groups are unacceptable and must be punished accordingly.

The language of the Wisconsin statute parallels the language found in both civil and criminal antidiscrimination laws. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1988). Individuals who are not hired *because of* their race, individuals who receive less pay *because of* the color of their skin, individuals who are not promoted *because of* their religion, individuals who are harassed *because of* their sex, individuals who are discharged *because of* their national origin — all the individuals in these situations and in numerous permutations are protected by Title VII from illegal discrimination. *See also* 42 U.S.C. §§ 1981, 1982, 1985(3).

In the criminal context, the federal criminal civil rights law codified at 18 U.S.C. section 242 prohibits violent acts committed against another person "by reason of his color, or race." 18 U.S.C. § 242 (1988). The law is derived from the Civil Rights Act of 1866, whose purpose was "to protect all persons in the United States in their civil rights and furnish means of vindication. In origin it was an antidiscrimination measure (as its language indicated), framed to protect Negroes in their newly won rights." *Screws v. United States,* 325 U.S. 91, 98-99 (1945).

The Wisconsin statute, section 939.645, reflects the state

legislature's determination that violent acts committed with discriminatory intent are more reprehensible than the same acts committed without discriminatory intent, just as firing someone from a job or denying them a loan or an apartment in which to live is more reprehensible when done for discriminatory reasons. The argument that penalty enhancement statutes such as section 939.645 punish biased thought and motive thus misses the basic point of hate crimes legislation. Hate crime statutes do not punish a perpetrator's thoughts; such statutes punish the act of discrimination committed against another person through violence. It is perfectly legal for the perpetrator of a hate crime to possess bigoted attitudes, and the Constitution guarantees the protection of those attitudes. However, it is unacceptable for individuals to cross the line between thought and action and commit criminal acts of violence against another person because of bigoted attitudes.

C. Discriminatory Motive May Be Considered in Criminal Sentencing

Even assuming that biased *motive* is implicated by the Wisconsin statute, there is no limitation in either law or logic that prohibits a court from considering a defendant's bad motive as a factor in enhancing punishment for a crime. In *Dawson v. Delaware,* 112 S. Ct. 1093 (1992), this Court held that a defendant's rights under the First Amendment were violated at sentencing when evidence of the defendant's membership in a white supremacist prison gang was introduced. The Court found that because there was no connection between the defendant's gang membership and his crime, "the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 1098.

Nevertheless, this Court made clear that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the

First Amendment." *Id.* at 1097. Thus, when racial beliefs are relevant to establishing a racial motive for committing a crime, evidence of those beliefs should be admissible at sentencing because a defendant's motive is a proper aggravating factor in determining the appropriate sentence. *Id.* at 1098; *see also Barclay v. Florida*, 463 U.S. 939, 949 (1983) ("the United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder").

The *Mitchell* court's peculiar interpretation of criminal motive in the instant case thus runs counter to the clear principles established by this Court in *Dawson v. Delaware* and *Barclay v. Florida* regarding the use of motive in criminal sentencing. The *Mitchell* court misconstrued the critical nexus between the defendant's motive and intent, and the defendant's act, and instead held that the defendant's thoughts and biases were unnecessarily regulated by the Wisconsin statute. In doing so, the Wisconsin Supreme Court erroneously divorced one necessary element of a crime from the other; under section 939.645, discriminatory intent is inextricably linked with the criminal act of violence. The Wisconsin hate crimes statute does no more than any other criminal statute that punishes what a legislature has found to be especially reprehensible conduct. Accordingly, this Court should uphold the law as constitutional.

III. EVEN IF IT AFFECTS SPEECH, THE WISCONSIN HATE CRIMES STATUTE IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT

Assuming, arguendo, that section 939.645 implicates freedom of speech in some way, the effects of the statute on protected expression are minimal and fall well within First Amendment guidelines established by this Court. Whether viewed as a law regulating expressive conduct or as a law

affecting speech incidental to violent conduct, the Wisconsin penalty enhancement statute complies with constitutional mandates.

A. Section 939.645 is Not Overbroad

A statute is unconstitutionally overbroad when its language is so sweeping that it regulates not only criminal conduct but expression that is protected by the First Amendment. *Osborne v. Ohio*, 110 S. Ct. 1691 (1990); *Houston v. Hill*, 482 U.S. 451 (1987); *New York v. Ferber*, 458 U.S. 747 (1982). However, as this Court has long held, overbreadth analysis is "strong medicine" that must be applied carefully, and "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The overbreadth line of cases is inapposite to the instant case because threats or violent acts against another person cannot possibly be considered expressive speech. At most, only ancillary speech is implicated, and any issue of ancillary speech must be determined on a case-by-case basis. *Brockett v. Spokane Arcade, Inc.*, 472 U.S. 491 (1985). Therefore, the question presented by the Wisconsin statute is a factual one and is totally inappropriate to support a facial challenge.

In the decision below, the Wisconsin Supreme Court nonetheless held that section 939.645 was unconstitutionally overbroad because it intruded upon protected speech through the use of a defendant's verbal statements as evidence of a biased motive. *State v. Mitchell*, 169 Wis. 153, 173-75, 485 N.W.2d 807, 815-16 (1992). Because a defendant's statements at the time of the violent act, as well as prior to the violent act, could be used as evidence of intentional selection, the court found that the statute produced a chilling effect on protected speech. *Id.* at 174-75, 485 N.W.2d at 816. Indeed,

the court went so far as to find that all of a defendant's prior statements and associations could be affected by the statute: "Because the circumstantial evidence required to prove intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill *every* kind of speech." *Id.* (emphasis added).

The court was wrong. On its face, section 939.645 punishes only discriminatory conduct, not speech: the statute enhances the punishment for violent acts that are committed because of the defendant's selection of a victim having membership within a protected group. Even as applied, the statute does not punish the words uttered by the defendant in the commission of the violent act. Words need not be used at all to prove intentional discrimination, and even if used, words simply become one form of circumstantial evidence that may be used to prove intent. A defendant's prior statements may be introduced as evidence of intent to discriminate just as prior statements may be introduced as evidence of other types of criminal intent. "It is no more a chilling of free speech to allow words to prove the act of intentional selection in this 'intentional selection' statute than it is to allow a defendant's words that he 'hated John Smith and wished he were dead' to prove a defendant intentionally murdered John Smith." *Mitchell*, 169 Wis. at 189, 485 N.W.2d at 822 (Bablitch, J., dissenting).[8]

The Wisconsin court's attempt to link the entire body of a defendant's prior statements and associations with the commission of a violent act directly conflicts with this Court's requirement that an overbreadth analysis must show both a real and a substantial regulation of protected expres-

[8]Nor is it more chilling to use a defendant's prior statements under section 939.645 than it would be to use a defendant's statements in proving any act of discrimination, as in housing, employment, voting rights, or other areas in which discrimination is prohibited.

sion. As the Wisconsin court itself noted, a defendant's prior statements cannot be introduced as evidence unless they are relevant to proving the intent attached to the particular criminal act. Words alone do not suffice; there must be a connection between the words and the criminal act. A defendant's speech — or anyone else's speech — is not chilled simply because a prior statement *may* be used as circumstantial evidence of discriminatory intent. The Wisconsin court's analysis thus goes well beyond a facial challenge and tests the statute as applied. The court's nexus is neither real nor substantial; it is speculative.

B. Section 939.645 Regulates Conduct and Satisfies the Requirements of *United States v. O'Brien*

Section 939.645 punishes violent conduct, and the defendant has offered no indication of what his violent actions were intended to express. Nevertheless, even if the defendant's conduct contained expressive elements that may be characterized as "speech," their punishment under section 939.645 is constitutional and complies with established First Amendment standards regarding expressive conduct.

Conduct that has an expressive element may infringe upon free speech values, but may be regulated if consistent with the First Amendment. In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court established guidelines to determine when expressive conduct may be regulated by a state. A statute may be upheld if:

> it is within the constitutional power of government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest.

Id. at 377.

The Wisconsin penalty enhancement statute easily complies with all of the elements of the *O'Brien* test. First, without question, the regulation of both violent conduct and discrimination is within the power of government. Second, the government's interest in protecting racial minorities and other groups subject to historical and extant violence is not only an important or substantial interest, but a compelling governmental interest. *See supra* Part I; *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992). Third, the governmental interest in preventing discriminatory violence is not related to the suppression of free expression. Section 939.645 regulates violent conduct and contain no limitations on speech. If anything, the statute encourages speech by helping curb discriminatory violence, which itself inhibits the free expression of the victim and other members of protected groups through fear and suppression. Finally, the incidental restriction on alleged First Amendment freedoms is certainly no greater than is essential to the furtherance of the interest. There is no indication that the defendant's actions were intended to express anything other than violence, and any suggestion that section 939.645 chills speech because oral remarks or epithets may later be used as evidence is suspect at best; even if the premise is accepted by this Court as valid, such a restriction on speech is minuscule when balanced against the state's compelling interest in preventing and punishing violent discriminatory conduct.

C. Section 939.645 Falls Outside the Rule and Within the Exceptions for Content-Based Speech Enumerated in *R.A.V. v. City of St. Paul*

In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), this Court invalidated as unconstitutional a St. Paul, Minnesota ordinance regulating expressive conduct such as cross burning or displaying a swastika that would arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender. Holding that the St. Paul ordinance was

impermissibly content-based, the Court ruled that "[c]ontent-based regulations are presumptively invalid" and that even categories of normally unprotected speech such as defamation, obscenity, and "fighting words" may not be regulated based on their content. *Id.* at 2543-45.

The language contained in the Wisconsin hate crimes statute is clearly distinguishable from the ordinance implicated in *R.A.V.* Section 939.675, as an enhancement statute, regulates violent conduct, conduct that is invidiously discriminatory and devoid of expression. The statute is predicated on the perpetrator's committing certain criminal acts of violence, such as assault or battery. The statute contains no restrictions on speech itself or on conduct that may express elements of speech. And even if the questioned conduct is incidentally expressive, section 939.675 does not limit the conduct based on its content; rather it punishes conduct because of the conduct's detrimental effects on victims, members of protected categories, and society as a whole.

Even if viewed as a content-based regulation, section 939.675 falls within the exceptions enumerated by the *R.A.V.* Court as falling within the constitutional boundaries of the First Amendment. First, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 2545. Section 939.675 by design regulates violent conduct that is proscribed for the purpose of securing the civil rights of protected individuals. The statute specifically targets violence committed with discriminatory intent, thus reflecting the legislative finding that violent acts committed against particular groups for discriminatory reasons are more reprehensible than other violent acts and should be punished accordingly.

Under section 939.675, it is not the content of speech that is prohibited but the act that "embodies a particularly intolera-

ble (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* at 2549 (emphasis in original). Indeed, the majority opinion in *R.A.V.* illuminates the distinction between the statute implicated in *R.A.V.* and the statute in the instant case: "St. Paul has not singled out an especially offensive mode of expression — it has not, for example, selected for prohibition only those fighting words that communicate ideas in *threatening* (as opposed to a merely obnoxious) manner." *Id.* (emphasis added). Therefore, statutes that prohibit threats or acts of violence are an offensive mode of expression and can be regulated.

Furthermore, the Court in *R.A.V.* acknowledged that threats of violence are outside First Amendment protection when it discussed the validity of punishing threats against the President. *Id.* at 2546. "[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special meaning when applied to the person of the President." *Id.* (citations omitted). Therefore, it is not only clear that threats or acts of violence are outside the protection of the First Amendment, but certain types of threats, for example against the President or against a person who is a member or perceived to be a member of a targeted group, can be regulated because the state recognizes that the risk "is in its view greater there." *Id.*

Another exception proffered by the *R.A.V.* majority was when "words can . . . violate laws not against speech but against conduct . . . , [and] a particular content-based category of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.* at 2546. "Thus, for example, sexually derogatory "fighting words," among other words, may

produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. . . . *Where the government does not target conduct on the basis of its expressive conduct, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.*" *Id.* at 2546-47 (emphasis added). Therefore, like the prohibition of sexually derogatory fighting words, the state can prohibit analogous prejudice-based threats and assaults. Again, section 939.675 does not regulate the speech of an actor independent of the actor's violent conduct. Oral epithets that may accompany the violent act are not themselves punished.

Finally, section 939.675 falls within the third *R.A.V.* exception because "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The statute does not in any way suppress the peaceful expression of ideas disfavoring one or more groups; the statute regulates violent conduct committed with the intent to discriminate against members of protected groups. In effect, as noted earlier, the statute encourages the exchange of ideas by allowing individuals to discuss freely their differences in attitude, rather than to resort to using violence to encourage fear and suppress discourse. And, as this Court itself stated in *R.A.V.*: "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47.

The Wisconsin hate crimes statute, section 939.675, targets discriminatory conduct, not speech, and thus falls outside the rule and within the exceptions expressed in *R.A.V. v. City of St. Paul.* The statute does not infringe on free speech in any way and should therefore be upheld as constitutional under the First Amendment.

CONCLUSION

For the foregoing reasons, the Wisconsin hate crimes statute is constitutional, and the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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Dated: January 1993

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Asian Pacific American Legal Consortium (NAPALC) is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander populations: the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles).

Founded in 1974, the Asian American Legal Defense and Education Fund is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy, and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees.

The Asian Law Caucus, Inc. is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian and Pacific Islander communities. Since 1972, it has provided free and low-cost multilingual legal services, community education, and general advocacy in the areas of immigration, housing, employment and labor, and civil rights, including discriminatory hate violence. In recognition of the growing problem of anti-Asian violence, the Hate Violence Project was created to develop and implement a comprehensive program to assist Asian victims and to reduce the incidence of hate violence through legal assistance, community education, public policy, and advocacy.

The Asian Pacific American Legal Center of Southern California is a nonprofit legal organization dedicated to

serving the Asian communities through direct services, community education, leadership development, and advocacy. Founded in 1983, it provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, interethnic relations, dispute resolution, and civil rights advocacy.

One of the main goals of NAPALC has been to promote racial harmony and to eradicate ethnic and racial violence towards Asian communities. All three organizations comprising NAPALC have extensive knowledge and experience dealing with the issue of hate violence, particularly as it pertains to Asians.

American Citizens for Justice, Inc. (ACJ), was created in 1983 as a coalition of Asian Pacific Americans and other concerned individuals in the Detroit, Michigan and Midwest areas to address anti-Asian violence. The Asian American Center for Justice, the professionally staffed office of ACJ, provides services in legal consultation and education, monitoring anti-Asian violence, advocacy, and community education. ACJ has advocated for the constitutionality of ethnic intimidation statutes in the State of Michigan and throughout the country.

The Asian Law Alliance of Santa Clara County (ALA) is a nonprofit legal services agency serving the Asian and Pacific Islander communities, particularly low-income and limited-English-speaking refugees and immigrants since 1977. ALA offers free and low-cost legal representation, preventive community education, advocacy, and outreach in a variety of Asian languages. Its programs prioritize issues related to government benefits, immigration, housing, family law/ domestic violence, and civil rights, including hate crimes.

Founded in 1969, Chinese for Affirmative Action (CAA) is a voluntary membership-supported organization dedicated to promote equality and justice for Asian Americans. CAA was instrumental in the 1987 formation of the Asian American Advisory Committee to the California Attorney General,

to address the rising tide of anti-Asian hostility in California, as well as other criminal justice problems in the Asian and Pacific Islander communities. The organization has rendered assistance to individuals who have been victims of racial hatred and discrimination, and, at the request of Asian Americans in diverse neighborhoods, has worked with individuals and public officials to reduce the level of intergroup tension.

The Chinese American Citizens Alliance (CACA) is the nation's oldest Asian American civil rights organization, established since 1895 to uphold equal rights for Chinese Americans. As a national membership-supported nonpartisan organization, CACA has participated in various challenges to legal actions that have impacted the Chinese American and Asian American community. CACA has consistently advocated for the passage of various hate crime laws and provided on-going hate crime awareness programs for the Chinese American community.

The Committee Against Anti-Asian Violence (CAAAV) is a nonprofit community-based organization that conducts education, organizing, and advocacy to combat the incidence of bias-related violence and police brutality, especially that directed against Asian Americans in the New York City area. CAAAV has testified to support passage of a hate crimes law in the State of New York and the establishment an all-civilian Civilian Complaint Review Board in New York City.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Established as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in various legal actions which have challenged racial prejudice and discrimination against Japanese Americans and other Asian Americans. JACL has advocated for, and supported, passage of various hate crime statutes, and monitors incidents of discriminatory hate violence.

The National Asian Pacific American Bar Association

(NAPABA) is a nationwide, nonprofit, nonpartisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 2500 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. Since its inception, stemming the rising tide of racial violence, particularly anti-Asian violence, has been one of NAPABA's top priorities. It has produced education materials on racial violence, and its members have testified on behalf of hate crime legislation and have been available as a resource to victims, families of victims, and communities affected by incidents of hate crimes.

The Organization of Chinese Americans, Inc. (OCA) is a nonprofit, nonpartisan advocacy organization that was founded in 1973. As one of the oldest national Chinese American civil rights organizations, OCA seeks to secure social justice, equal opportunity, and equal treatment of Chinese Americans and Asian Americans, and to eliminate prejudices and ignorance about Chinese Americans and Asian Americans. OCA has been an advocate for the passage, strict implementation, and enforcement of hate crime legislation. The organization has produced and disseminated hate crime educational materials.

APPENDIX B

RECENT EXAMPLES OF HATE CRIMES AGAINST ASIANS AND PACIFIC ISLANDERS*

June 1982	Vincent Chin, a Chinese American, was beaten to death by two unemployed auto workers in Detroit who blamed him for the downfall of the American automobile industry.
Dec. 1982	Crosses were burned on the lawn of a Filipino family in San Leandro, California.
May 1983	A Vietnamese high school student, Thong Huynh, was stabbed to death in Davis, California by a white student after racial taunting of Vietnamese students by the white students.
Sept. 1987	A Cambodian American teenager was drowned near Lowell, Massachusetts by a youth shouting racial slurs.
Sept. 1987	An Asian Indian physician was attacked with a bat by three white assailants in Jersey Heights, New Jersey. The victim was hospitalized for several days and has undergone extensive rehabilitation for head trauma.
Jan. 1989	Five Southeast Asian children were gunned down by Patrick Purdy in Stockton, California. Twenty children were wounded.
July 1989	Ming Hai "Jim" Loo, a Chinese American, was beaten to death by men blaming him for American casualties in Vietnam.
Nov. 1989	Three Asian American shop owners, two Chinese American and one Korean American, were beaten and racially taunted by a band of white teens in Castro Valley, California.

*This list is by no means exhaustive; rather, it is illustrative of the many instances of violent discriminatory acts perpetrated against Asians and Pacific Islanders. The list is compiled from various sources, including newspaper and broadcast media reports and personal accounts presented to *amici curiae*. A complete list of sources is available from counsel for *amici*.

Dec. 1989 Forty youths, alleged to be members of the gang "Master Race," shouted racial epithets and attacked five Asian American youths in Queens, New York. One victim, struck by a broken glass bottle, required eighty five stitches.

Mar. 1990 A thirty-one-year-old Chinese immigrant was fatally stabbed on a subway train in New York City. Prior to stabbing the victim, the assailant repeatedly called the victim "Eggroll."

Apr. 1990 Two Japanese students were attacked and beaten in La Crosse, Wisconsin by white students.

Apr. 1990 Oklahoma Ku Klux Klan leader Joe Grego made this statement, "Ask a white worker how it feels to give up a job that feeds his family to a crop of dog-eating gooks from Asia. You pick up the rifle and solve the Asian problems just like they ought to be solved."

May 1990 A Hmong youth, riding with two white women coworkers, was beaten and racially taunted by white assailants in Yuba County, California.

May 1990 Three Vietnamese men were assaulted in Brooklyn, New York; one man was assaulted with a claw-hammer. Mistaking the men for Koreans, the assailants shouted: "Koreans, what are you doing here!" and "Get out of America!"

June 1990 A Cambodian American, Heng Lim, was killed by a white male with a 2x3 board in South Philadelphia, Pennsylvania.

Aug. 1990 A Vietnamese teenager was beaten and kicked to death by two "skinheads" in Houston, Texas.

Aug. 1990 After being called a "chink" and a "gook," a Chinese man was attacked by two white men carrying a baseball bat and a tire iron in Bensonhurst, New York.

Sept. 1990 The Greater Phoenix Chinese Christian Church in Phoenix was defaced with racial graffiti and bullet holes.

Sept. 1990 Two Japanese men driving in their car in San Francisco were struck by the car of a white male. When questioned about why he swerved into the

victims' car, the perpetrator said it was because they were "gooks".

Oct. 1990 Four white men linked to the Ku Klux Klan seriously beat six Japanese students in Denver, Colorado.

Oct. 1990 The Japanese American Citizen's League's headquarters in Glendale, Arizona was defaced with a painted swastika and the words "White Supreme."

Oct. 1990 A Filipino child was held hostage by a man at the St. Patrick's Church in San Francisco, California who said he hated Orientals. The man held a knife to the 3-year-old child's throat and cheek in front of the horrified congregation after church service.

Nov. 1990 JACL's Robert Matsuishi received death threats after speaking on television about redress payments for Japanese internees during World War II.

Jan. 1991 As several Koreans were playing golf in Milpitas, California, one of them was attacked and choked by a white man, who told him: "We're big Americans . . . we don't need you . . . Oriental boys here."

Jan. 1991 "KKK" was spray-painted on the home of a Samoan man in Oldsmar, Florida.

Feb. 1991 The windows of a car owned by a Filipino American in San Jose, California were shot out and the words "Die Nip" and "Pearl Harbor" spray-painted on the side.

May 1991 A Chinese foreign student was attacked by seven white high school students on the Cornell University campus because he is Asian.

June 1991 Kimochi, Inc., a Japanese American senior citizens organization in San Francisco, California, received threatening letters saying "Death to all Former Internees."

June 1991 Two Japanese American women were assaulted at a restaurant in Huntington Beach, California by seven men and women who taunted, shoved, punched and poured drinks on them. The women were speaking in Japanese and the attackers insisted that they speak English.

June 1991 A cross was burned in the yard of a Filipino Ameri-

can family in Albuquerque, New Mexico.

Aug. 1991 A Chinese American high school graduate was beaten unconscious by members of a white supremacist skinhead group in Fullerton, California.

Aug. 1991 Seven Thai monks and two Buddhists at a Thai Buddhist monastery were murdered execution-style in Maricopa County, Arizona.

Nov. 1991 In Laguna Beach, California, the home of a Chinese American was vandalized with "swastikas" and the words "Oriental Out" "Chinese Out".

Nov. 1991 In Claremont, California, the home of a Japanese American was vandalized, with feces left on the front porch and message "You riceball, eat shit" spray painted on the garage.

Nov. 1991 The South East Japanese Center in Norwalk, California had racist graffiti scrawled over the building. The words "Nips" filled three windows and "Go Back to Asia" defaced a desk. Shattered glass, shredded documents and overturned furniture littered the floors of the center. White paint covered pictures, photos, walls and windows. The week before, twenty cars parked at the center's parking lot had their tires slashed during a meeting.

Nov. 1991 A Chinese American woman in San Francisco was verbally and physically assaulted by two white males while doing her laundry. She was called "Chink", "Little Shit" and told to "Go back to your own country."

Dec. 1991 Three molotov cocktails were thrown at the home of an elderly Japanese couple in San Leandro, California.

Dec. 1991 A Vietnamese restaurant in San Jose, California, was set on fire and spray painted with the words: "Merry Christmas Chink."

Dec. 1991 Korean grocery owners in New York City were physically assaulted and told "You fucking Chinese get out of the U.S.A."

Dec. 1991 In Compton, California, a Thai woman was physically assaulted by two men wielding baseball bats

who mistook her for a Korean.

Dec. 1991 In Sacramento, California, a Japanese American-owned rice cake store was shot with a pellet gun and the window of the owner's daughter's car was shattered the next day.

Jan. 1992 An African American and Asian American couple (with a six month old baby) in Modesto, California, was verbally abused and physically assaulted by a group of teenagers.

Jan. 1992 At the headquarters of the Japanese American Citizens League, the group's planned fifty-year commemoration of Japanese American internment camps prompted a recorded bomb threat: "I'll show you a year of remembrance, you dirty Japs. You just watch out for bombs planted around your day of remembrance. We'll get you, you dirty pigs."

Feb. 1992 A group of Japanese American Girl Scouts, selling cookies in front of a supermarket in West Los Angeles, California, are verbally harassed by passersby who state, "We only buy from Americans."

Feb. 1992 A fourteen-year-old Korean boy in Bronx, New York was chased by approximately twenty youths who called him racially derogatory names and beat him with a bat, causing injuries that required hospitalization for five days.

Mar. 1992 At Pomona College in Southern California, a large sign that originally read "Asian American Studies Now" was defaced to read "Asian Americans Die Now."

Mar. 1992 In Torrance, California, a Thai man was beaten in the laundry room of his apartment complex by a white man who demanded to know if he was Japanese.

Mar. 1992 In Walnut, California, a third generation Japanese woman found her front yard littered with toilet paper and graffiti painted on the garage saying "Japs Go Home."

Apr. 1992 An Asian Indian doctor in Jersey City Heights, New Jersey was struck in the head and sprayed with mace

by youths who shouted "Hindu, Go Home."

Apr. 1992 At the San Diego State University, a swastika was found painted over a sign that read "Asian Americans for Higher Education."

Apr. 1992 In Sacramento, California, a Japanese American mother reported that her son was being repeatedly verbally and physically assaulted at his junior high school by a classmate who bragged that his parents were members of the Ku Klux Klan.

Apr. 1992 Also in Sacramento, two teenage Japanese Americans were verbally and physically assaulted at their hotel by suspected skinheads.

Apr. 1992 In Northern California, a Japanese American woman and her German American husband were harassed by their neighbor, a white woman, who yelled "You Nazi! You should take your Jap wife and get out!"

Apr. 1992 During the Los Angeles riots, in addition to the burning and destruction of the thousands of Asian businesses, the following occurred:

Thanh Lam, a young man of Chinese and Vietnamese ancestry, was brutally murdered by rioters in Compton, California.

A Japanese American motorist was attacked by a band of enraged rioters. The man sustained heavy injuries to his eye, ear and mouth, and required twenty-four stitches in his head.

A Japanese American man employed at a travel agency was shot in the thigh while he was walking to his car.

An elderly Japanese American man was dragged out of his vehicle and assaulted.

May 1992 A nineteen-year-old Asian male was physically assaulted by two strangers yelling racial slurs in the parking lot of an Auburn, California restaurant.

June 1992 In Huntington Beach, California, four Asian teenagers were assaulted by three white males wielding a steel anti-theft device who smashed the victims' car windshield while calling them "Japs" and "Nips." Two of the victims sustained deep wounds.

Aug. 1992 A young Vietnamese student in Coral Springs, Florida was brutally beaten to death by fifteen young men who shouted racially derogatory remarks at the victim.

Aug. 1992 The home of a Japanese American family in Anaheim, California is spray-painted with swastikas and graffiti saying "Fuck You Nips."

Sept. 1992 A delicatessen in Manteca, California owned by a South Asian couple was burned down after the couple received threatening telephone calls saying "You dirty Indians, get out of here. Go back to India where you belong."

Oct. 1992 A Chinese American male college student is beaten by five teenagers or a bus in San Francisco. Before the beating, the victim heard racial slurs such as "Get that Chinaman" and "Chink."

Nov. 1992 A Chinese immigrant girl was attacked by teenagers who spray-painted her face black in Manhattan, New York.

Dec. 1992 The home of a Chinese American family in La Habra, California was spray-painted with graffiti saying "KKK." The latest incident was the fifth graffiti incident affecting the same family during a six month period.

APPENDIX C

STATE HATE CRIMES STATUTES

Cross Burning

Ariz. Rev. Stat. Ann. § 13-1504 (1989)
Cal. Penal Code § 11411 (West Supp. 1992)
Conn. Gen. Stat. Ann. § 46a-58(c) (West 1986)
Fla. Stat. Ann. § 876.17 (West 1976)
Ga. Code Ann. § 16-11-37 (Harrison 1990)
Md. Ann. Code art. 27, § 10A (1987)
N.C. Gen. Stat. § 14-12.12 (1986)
R.I. Gen. Laws § 11-53-2 (1990)
S.C. Code Ann. § 16-7-120 (Law. Co-op. 1985)
Vt. Stat. Ann. tit. 13, § 1456 (Supp. 1990)
Va. Code Ann. § 18.2-423 (1988)
Wash. Rev. Code Ann. § 9A.36.080 (Supp. 1991)

Data Collection

Cal. Penal Code § 13023 (West Supp. 1991)
Conn. Gen. Stat. Ann. § 29-7m (West 1990)
D.C. Code Ann. § 22-4002 (Supp. 1992)
Fla. Stat. Ann. § 877.19 (West Supp. 1992)
Idaho Code § 67-2905 (1989)
Ill. Rev. Stat. ch. 127, para. 55a(31) (Supp. 1991)
Me. Rev. Stat. Ann. tit. 5, § 4660 (1989)
Mass. Gen. Laws Ann. ch. 22C § 32 to 35 (West 1992)
Md. Ann. Code art. 88B, § 9 (1985 & Supp. 1990)
Minn. Stat. Ann. § 626.5531 (West. Supp. 1992)
Okla. Stat. Ann. tit. 21,§ 850(G) (West Supp. 1992)
Or. Rev. Stat. § 181.550 (1991)
R.I. Gen. Laws § 42-28-46 (1988)
Tex. Gov't Code Ann. § 411.046 (West Supp. 1993)

Desecration/Defacement of Religious Objects or Property

Ala. Code § 13A-11-12 (1982)
Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Ark. Stat. Ann. § 5-71-215 (1987)
Cal. Penal Code § 11411 (West Supp. 1992)
Conn. Gen. Stat. Ann. § 46A-58 (West 1986)
Colo. Rev. Stat. § § 18-9-113 (1986 & Supp. 1992)

Del. Code Ann. tit. 11, § 1331 (1987 & Supp. 1990)
Haw. Rev. Stat. § 711-1107 (1985)
Idaho Code § 18-6201 (1987)
Ill. Rev. Stat. ch 38, § 21-1.2 (Supp. 1991)
Ind. Code Ann. § 35-43-1-2 (West Supp. 1992)
Kan. Stat. Ann. § 21-4111 (1988)
Ky. Rev. Stat. Ann. § 525.110 (Michie/Bobbs-Merrill 1990)
Me. Rev. Stat. Ann. tit. 17-A § 507 (1983 & Supp. 1990)
Md. Ann. Code art. 27, § 470A (Supp. 1990)
Mass. Gen. Laws Ann. ch. 266, § 98 (West 1990)
Miss. Code Ann. § 97-17-39 (Supp. 1991)
Mo. Rev. Stat. § 574.085 (Supp. 1991)
N.J. Stat. Ann. § 2C:33-9 (West 1982)
Or. Rev. Stat. § 166.075 (1990)
18 Pa. Cons. Stat. Ann. § 5509 (Purdon 1985)
Tenn. Code Ann. § 39-17-311 (Supp. 1990)
Va. Code Ann. § 18.2-127 (Supp. 1991)

Desecration of a Place of Worship

Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Ga. Code Ann. § 16-7-26 (Harrison 1990)
Mass. Gen. Laws Ann. ch. 266, §§ 2, 127A (West 1990)
N.J. Stat. Ann. § 2C:33-9 (West 1982)
N.M. Stat. Ann. § 30-13-1 (1984)
Okla. Stat. Ann. tit. 21, § 1765 (West 1983)
Va. Code. Ann. §§ 18.2-127, 18.2-138 (Supp. 1991)

General Civil Rights Statute - Criminal

Idaho Code §§ 18-7301 to -7303 (1987)
Mass. Gen. Laws Ann. ch. 265, § 37 (West 1990)
Mont. Code Ann. § 45-5-221 (1989)
N.D. Cent. Code § 12.1-14-05 (1985)
18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)
R.I. Gen. Laws § 9-1-35 (1985)
S.C. Code Ann. § 16-5-10 (Law. Co-op. 1985)
Vt. Stat. Ann. tit. 13, § 1457 (Supp. 1990)
Wis. Stat. Ann. § 895.75 (West Supp. 1990)

General Civil Rights Statute - Civil

Neb. Rev. Stat. § 20-148 (1987)
N.Y. Civ. Rights Law §§ 40-c, 40-d (McKinney 1991)
Or. Rev. Stat. § 30.190 (1988)

General Intimidation/Harassment - Criminal

Ala. Code § 13A-11-12 (Supp. 1982)
Ariz. Rev. Stat. Ann. § 13-1504 (1989)
Ark. Stat. Ann. § 5-71-207 (1987)
Cal. Penal Code §§ 422.6, 11410 (West Supp. 1992)
Colo. Rev. Stat. § 18-9-121 (Supp. 1990)
Conn. Gen. Stat. Ann. § 53-37 (West 1985)
Ga. Code Ann. § 16-11-39 (Harrison 1992)
Idaho Code §§ 18-7901 to -7904 (1987)
Ill. Rev. Stat. ch. 38, § 12-7.1 (West Supp. 1993)
Iowa Code Ann. § 729.5 (West Supp. 1991)
Me. Rev. Stat. Ann. tit. 17 §§ 2931-2932 (1983 & Supp. 1990)
Mass. Gen. Laws Ann. ch. 265, § 39 (West 1990)
Md. Crim. Law Code Ann. § 470A9b)-(c) (1992)
Mich. Comp. Laws Ann. § 750.147b (West 1991)
Minn. Stat. Ann. § 609.2231 (West Supp. 1991)
Mo. Ann. Stat. § 574.093 (Vernon Supp. 1992)
Nev. Rev. Stat. § 207.185 (1991)
N.J. Stat. Ann. §§ 2C:12-1, 2C:33-4, 2C:43-7, 2C:44-3 (1991)
N.Y. Penal Law § 240.31 (McKinney Supp. 1989)
N.C. Gen. Stat. § 14-12.13 (1986)
N.D. Cent. Code § 12.1-14-04 (1985)
Okla. Stat. Ann. tit. 21. § 850 (West Supp. 1992)
Or. Rev. Stat. §§ 166.155, 166.165 (1991)
18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)
R.I. Gen. Laws § 11-42-3 (Supp. 1990)
S.D. Codified Laws Ann. § 22-27-1 (1988)
Tenn. Code Ann. § 39-17-309 (Supp. 1990)
Wash. Rev. Code Ann. § 9A.36.080 (Supp. 1991)
Wis. Stat. Ann. § 943.012 (West Supp. 1990)

General Intimidation/Harassment - Civil

Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Cal. Civ. Code §§ 51.7, 52.1 (West Supp. 1992)

D.C. Code Ann. § 22-4004 (Supp. 1992)
Me. Rev. Stat. Ann. tit. 5, §§ 4681 (Supp. 1992)
Mass. Gen. Laws Ann. ch. 12, §§ 11H to 11J (West 1990)
Mo. Rev. Stat. § 537.523 (Supp. 1991)
N.C. Gen. Stat. § 99D-1 (1992)
Ohio Rev. Code Ann. § 2921.45 (Anderson 1987)

Harassment through Publications/Group Libel

Fla. Stat. Ann. § 836.11 (West 1976)
Mass. Gen. Laws Ann. ch. 272, § 98C (West 1990)

Disturbance of Religious Worship

Ark. Stat. Ann. § 5-71-207 (1987)
Cal. Penal Code §§ 302, 11412 (West Supp. 1991)
Fla. Stat. Ann. § 871.01 (1976)
Idaho Code § 18-6201 (1972)
Md. Ann. Code art. .27, § 470A (Supp. 1990)
Mass. Gen. Laws Ann. ch. 272, § 38 (West 1990)
Mich. Stat. Ann. § 28.366 (Callaghan 1990)
Minn. Stat. Ann. § 609.28 (West 1987)
Miss. Code Ann. § 97-35-17 (1973)
Nev. Rev. Stat. § 201.270 (1986)
N.M. Stat. Ann. § 30-13-1 (1984)
N.Y. Penal Law § 240.21 (McKinney 1989)
Okla. Stat. Ann. tit. 21, §§ 914, 915 (West 1983)
S.D. Codified Laws Ann. § 22-27-1 (1988)
Va. Code Ann. § 18.2-415 (Supp. 1991)
W. Va. Code § 61-6-13 (1989)

Paramilitary Training

Ark. Stat. Ann. § 5-71-302 (1985)
Cal. Penal Code § 11460 (West 1982)
Colo. Rev. Stat. § 18-9-120 (1986)
Conn. Gen. Stat. Ann. § 53-206B (West 1986)
Fla. Stat. Ann. § 790.29 (West Supp. 1991)
Idaho Code §§ 18-8101 to -8105 (1987)
Ill. Rev. Stat. ch. 129, § 220.94a (West Supp. 1991)
Mich. Stat. Ann. § 28.796(1) (Callaghan 1990)

Mo. Rev. Stat. § 574.070 (Supp. 1991)
Neb. Rev. Stat. § 28-1481 (1989)
N.C. Gen. Stat. § 14-288.20 (1986)
N.J. Stat. Ann. § 2C:39-14 (West 1991)
Or. Rev. Stat. § 166.660 (1990)
R.I. Gen. Laws §§ 11-55-2, 11-55-3 (Supp. 1990)
Va. Code Ann. §§ 18.2-433 (1988)

Secret Societies
N.C. Gen. Stat. §§ 14-12.2 to -.12.6 (1986)

Sentence Enhancement
Cal. Penal Code §§ 190.2(a)(16), 422.7, 422.75, 1170.75, 1170.85 (West Supp. 1992)
D.C. Code Ann. § 22-4003 (Supp. 1992)
Fla. Stat. Ann. § 775.085 (Supp. 1992)
Ill. Rev. Stat. ch. 38, § 1005-5-3.2 (Supp. 1993)
Mont. Code Ann. § 45-5-222 (1991)
N.H. Rev. Stat. Ann. § 651:6I(g) (1986 & Supp. 1992)
Utah Code Ann. § 76-3-203.3 (1992)
Vt. Stat. Ann. tit. 13, § 1455 (Supp. 1991)

Threats to Immigrants
R.I. Gen. Laws § 11-53-3 (Supp. 1990)

Wearing of Masks/Hoods/Disguises
Conn. Gen. Stat. Ann. § 53-37a (West 1985)
Fla. Stat. Ann. § 876.12 (West Supp. 1991)
Ga. Code Ann. § 16-11-38 (Harrison 1990)
Ill. Rev. Stat. ch. 38, para. 12-4 (Supp. 1991)
La. Rev. Stat. Ann. § 14:313 (West 1986)
Mich. Stat. Ann. § 28.628 (Callaghan 1990)
Minn. Stat. Ann. 609.735 (West 1987)
N.C. Gen. Stat. §§ 14-12.7 to -12.11, 14-12.14 (1986)
Okla. Stat. Ann. tit. 21, § 1301 (West 1983)
S.C. Code Ann. § 16-7-110 (Law. Co-op. 1985)
Tenn. Code Ann. § 39-17-309(c) (Supp. 1990)
Va. Code Ann. § 18.2-422 (1988)
W. Va. Code § 61-6-22 (1989)
Wis. Stat. Ann. § 939.641 (West 1985)

Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF LARRY ALEXANDER, RALPH BROWN, ALAN DERSHOWITZ, DAVID GOLDBERGER, GERALD GUNTHER, NAT HENTOFF AND DIANE ZIMMERMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	7
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Gitlow v. New York, 268 U.S. 652 (1925)	10
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West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	5
Wooley v. Maynard, 430 U.S. 705 (1977)	5

Other Authorities

Larry Alexander, *The ADL Hate Crime Statute and the First Amendment*, Criminal Justice Ethics, Vol. 11, No. 2 (1992) 6

Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, Criminal Justice Ethics, Vol. 11, No. 2 (1992) 4, 5

Geoffrey Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978) 10

Constitutional Provisions

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of Larry Alexander, Ralph Brown, Alan Dershowitz, David Goldberger, Gerald Gunther, Nat Hentoff, and Diane Zimmerman as amici curiae in support of affirmance of the decision of the

Wisconsin Supreme Court below, holding that the Wisconsin hate crimes statute, section 939.645 Stats., violates the First and Fourteenth Amendments to the United States Constitution. The amici are all writers and scholars on constitutional law and/or the First Amendment right of freedom of expression, who have a long-standing belief in the importance of the freedom of thought.

STATEMENT

It is the position of the Amici that the First Amendment right of free expression, United States Constitution Amend. I, as applied to the states through the Due Process Clause of the Fourteenth Amendment, United States Constitution Amend. XIV, § 1, has properly and consistently been construed by this Court to protect the freedom of thought on political and social issues, even when no communicative act is either involved or intended. Moreover, the freedom of thought protected by the First Amendment includes within it the political or social attitudes that motivate criminal acts. Because as construed by the Wisconsin Supreme Court section 939.645 imposes penalties solely for the holding of particular political or social attitudes, the statute should be found unconstitutional.

ARGUMENT

I.

AS CONSTRUED BY THE WISCONSIN SUPREME COURT, SECTION 939.645 IMPOSES PENALTIES FOR THE HOLDING OF POLITICAL THOUGHTS AND SOCIAL ATTITUDES.

In its opinion below, the Wisconsin Supreme Court held unambiguously that the state's hate crime sentence enhancer, section 939.645 Stats., constitutes the penalization of the holding of racist thoughts:

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

State v. Mitchell, 485 N.W.2d 807, 812 (Wis. 1992).

It is well established that this Court, in reviewing a state statute, is bound by a construction of that statute by the state's highest court. As this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945): "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."

Such a principle derives from the precepts of federalism, under which state courts are given primary and ultimate responsibility for the growth and development of state law. This Court is therefore bound by the Wisconsin Supreme Court's holding that section 939.645 penalizes the holding of bigoted thoughts.

II.

THE FIRST AMENDMENT RIGHT OF FREEDOM OF EXPRESSION PROTECTS THE FREEDOM OF THOUGHT.

The inclusion of the freedom of thought within the constitutional protection of freedom of expression is wholly consistent with accepted precepts of American political and constitutional theory. If inherent in the structure of a democratic society is the potential for the citizenry to choose any political course of action (even if, on occasion, only through the supermajoritarian amendment process), the government of such a society cannot be allowed to penalize an individual's holding of any political attitude. For by hypothesis, in a democracy the citizenry has the option ultimately to adopt that particular political attitude. More importantly, the freedom to communicate and persuade, so central to a commitment to societal self-determination, is of little use if both the communicator and listener can be punished for having the thought, either before or after it is communicated. Thus, the freedoms of expression and thought are inextricably intertwined: Attempting to protect one without the other will inevitably prove to be impossible.

There also exists a strong practical basis for recognizing the centrality of freedom of thought in our political system. Citizens cannot be expected to exercise and develop the intellectual and decision making capabilities required to make life-affecting decisions if they must live in constant fear that the government will penalize them for holding particular social or political attitudes. The democratic system, of which the First Amendment is such an essential element, cannot be expected to thrive—or even survive—under such circumstances. *See* Martin H. Redish, *Freedom of Thought as Freedom of Expression:*

Hate Crime Sentencing Enhancement and First Amendment Theory, Criminal Justice Ethics, Vol. 11, No. 2, at 29, 41-32 (1992).

It is not surprising, then, that on numerous occasions, this Court has made clear that the First Amendment protects the freedom of thought, as well as the freedom of expression. This Court has so stated expressly in several decisions. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State").

In a number of other decisions, the need to protect freedom of thought has provided the rationale for the Court's holdings, where activity was found to be protected by the First Amendment, despite the fact that it was not designed to communicate information or opinion. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (recognizing First Amendment right of school child to refuse to pledge allegiance to the flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (recognizing individual's First Amendment right to cover license plate slogan inconsistent with the individual's religious beliefs). What was being protected in both *Barnette* and *Wooley* is the sanctity of the individual's personal beliefs, a sanctity that would have been violated had the individuals in those cases been forced to accept the government's moral and intellectual orthodoxy.

III.

SECTION 939.645 VIOLATES THE CONSTITUTIONALLY PROTECTED FREEDOM OF THOUGHT.

As construed by the Wisconsin Supreme Court, Section 939.645 imposes penalties solely because of the racial hatred that motivates the criminal behavior in question. In effect, then, this statute penalizes individuals, not for their direct criminal behavior (which is already punishable under preexisting criminal laws), but for their underlying racist or bigoted attitudes. Because such laws have the intended effect of penalizing thought processes and political motivations found to be offensive to those in power, they constitute classic abridgements of the constitutionally protected freedom of thought.

To comprehend the constitutionally problematic nature of such laws, one need only hypothesize a sentencing enhancement law that penalizes political motivations other than racial or religious prejudice. Assume, for example, that a state legislature enacts a law enhancing the sentence for any crime motivated out of a pro-choice belief, or a pro-life belief, or a belief in Communism or political correctness. One could also imagine a state law that made criminal the burning of all flags, but enhanced the sentences only of those found to have been motivated by a desire to cast aspersions on the United States. *See* Larry Alexander, *The ADL Hate Crime Statute and the First Amendment*, Criminal Justice Ethics, Vol. 11, No. 2, at 49, 50-51 (1992). All of these laws unconstitutionally increase criminal penalties because of the offensiveness, to those in power, of the underlying political attitudes. Such enactments could accurately be characterized as "Sacco and Vanzetti" laws, named for the two men who were sentenced to death, in the view of many, not for the crimes they had committed but for their political beliefs.

If one begins constitutional analysis by assuming that because communication is not being impeded, sentence enhancement laws cannot violate the First Amendment protection of expression, then it is logically impossible to find these hypothetical sentence enhancements to constitute First Amendment violations. Yet for reasons already discussed, such laws should be found to threaten core notions of constitutionally protected freedom.

This Court's decision last term in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), provides strong support for the conclusion that sentencing enhancement laws are unconstitutional. There a majority of this Court held that racist expression was as deserving of First Amendment protection as the expression of any other political viewpoint. 112 S. Ct. at 2548. This Court further held that the government could not constitutionally prohibit the use of racist fighting words while leaving other forms of fighting words unregulated, even though "fighting words" as a form of expression are unprotected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Similarly, one could posit that while conduct that is the subject of sentencing enhancement laws is not protected First Amendment activity, the selective punishment of such conduct on the basis of underlying viewpoint should also be deemed unconstitutional.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), this Court indicated in dictum that a sentencing judge may, consistent with the First Amendment, take into account in fashioning a sentence a criminal defendant's membership in a racist organization, where that membership was relevant to the underlying criminal conduct. *Id.* at 1097. That dictum should not be deemed controlling in this case, however, because there exists a significant difference between judicial exercise of discretion on the basis of the

totality of the circumstances in an individual case (as in *Dawson*) and a generalized, non-discretionary legislative directive that all sentences that fall within a specified category are to be enhanced.

To the extent that this Court finds the *Dawson* dictum to be controlling here, it is respectfully submitted that this Court should reconsider the merits of the conclusion contained in that dictum. It should be noted that this Court in no way intended to suggest that the *Dawson* defendant's membership was not fully protected by the First Amendment. On the contrary, the opinion fully acknowledged that it was. 112 S. Ct. at 1096-97. Once it is acknowledged that the membership was protected activity, however, it is difficult to understand how adding to the defendant's sentence because of that fact does not impede or penalize the exercise of First Amendment rights. This point can be established by hypothesizing a situation in which a judge enhances a sentence because of his finding that the defendant's hatred for government policies had caused him to commit the crime. In such a case, sentence enhancement, even in an individualized manner, would clearly violate the First Amendment. Because *R.A.V.*—decided after *Dawson*—established that racist speech is as protected as any other subject of expression, the same reasoning should apply when racist attitudes are penalized.

IV.

NONE OF THE ASSERTED JUSTIFICATIONS FOR SENTENCING ENHANCEMENT LAWS JUSTIFIES THE VIOLATION OF THE CONSTITUTIONALLY PROTECTED FREEDOM OF THOUGHT TO WHICH SUCH LAWS GIVE RISE.

Once it is established that sentencing enhancement laws impede the freedom of thought protected by the First Amendment on the basis of underlying viewpoint, it

becomes clear that none of the rationales asserted for such laws can overcome the heavy burden imposed by the strict scrutiny standard on viewpoint regulations. The arguments that have been employed to justify hate crime sentencing enhancement laws against First Amendment attack amount to the following contentions:

1. Racial prejudice presents a unique threat to the well being of our society, and therefore while sentence enhancement for political or social motivations is generally unconstitutional, such enhancement is constitutionally permissible in these particular instances.

2. Crimes motivated by racial or religious prejudice do in fact cause more substantial harm than the exact same crimes when committed without such motivation, because they create terror in the community that lingers long after the particular crime has been committed. Moreover, such crimes are more likely than other crimes to lead to retaliatory violence and social disturbance.

3. If hate crime sentencing enhancement laws are unconstitutional, then so must be the prohibition, contained in Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000-2, of discrimination in employment on the basis of race or religion, as well as numerous other laws that prohibit discrimination.

4. It is well accepted in the law that legal consequences may flow from an individual's state of mind when committing a crime.

Examination of each of these assertions demonstrates their inadequacy. As to the first assertion, if there is one issue that *R.A.V.* resolves, it is that the dangers caused by racism and prejudice are *not* unique for First Amendment purposes. If they were, then hate *speech* laws, such as the one invalidated in *R.A.V.*, would also have to be constitutional—and this Court has made clear that they are not. Nor could they be, if the First Amendment's

well-established theoretical and doctrinal prohibition on viewpoint regulation means anything. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970) (invalidating congressional ban on unauthorized wearing of American military uniforms in a manner calculated to discredit the armed forces). *See generally* Geoffrey Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

The argument premised on the residual terror of crimes motivated by prejudice has a strong superficial appeal. The theory breaks down, however, when one recalls that hate crime sentencing enhancement laws are designed to eradicate community terror only selectively. Numerous crimes, politically motivated or otherwise, may give rise to such terror, yet sentencing enhancement laws deal only with those that have been motivated by prejudice. The terror argument therefore cannot avoid the viewpoint selectivity that renders sentencing enhancement laws constitutionally suspect. Thus, like the ordinance invalidated in *R.A.V.*, hate crime sentencing enhancement laws are defective because even though they purport to respond to a legitimate state concern, they are underinclusive. The state's legitimate concern, then, could be met by alternatives that are less invasive of First Amendment rights, such as viewpoint-neutral laws that increase sentences when it can be established that the defendant intentionally sought to terrorize a community or that the victims suffered special psychological harm.

The argument that racially or religiously motivated crimes are more likely than other crimes to bring about retaliation or general societal disturbance is unacceptable, because it draws on First Amendment doctrine that has long been discredited. Not since *Gitlow v. New York*, 268 U.S. 652 (1925), has the "tendency" of expression to lead

to criminal conduct provided a sufficient basis for suppression. In *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*), this Court held that advocacy of unlawful conduct could be regulated only "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such actions." (Emphasis added) Here, in an attempt to justify the penalization of thought, the State merely makes conclusory and speculative assertions about the possibility of harm at some future (and undetermined) date. Even if the *Brandenburg* standard of imminency and likelihood concerning future violence arising from hate crimes could be met *in a particular case*, surely the mere possibility of harm cannot justify a blanket penalization of underlying political thought.

No more persuasive is the argument that invalidation of sentencing enhancement laws would threaten the continued vitality of Title VII or any other anti-discrimination law. There is all the difference in the world between hate crime sentencing enhancement laws on the one hand and anti-discrimination laws on the other. Hate crime sentencing laws punish *nothing more* than internal motivation; preexisting criminal laws already punish the behavior and harmful impact involved. Anti-discrimination laws, on the other hand, punish a concrete, negative impact on individuals. Indeed, discrimination need not even be motivated by prejudice for such a practice to be deemed illegal. Conceivably, an employer's motivation may be limited to the economic concern that his business would not be as successful if he hires individuals of a certain race or religion, yet his discriminatory practices will be deemed just as illegal as if they had been motivated exclusively out of racial hatred.

To the extent that anti-discrimination laws actually could be deemed to penalize underlying political thought, such

an impact would merely be incidental to the government's attainment of its legitimate, nonspeech goal of preventing harm. In this sense, anti-discrimination laws are analogous to the law upheld by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). There this Court held that a law making it a crime to destroy one's draft card is constitutional, despite the fact that such destruction had been employed as part of a political protest. This was because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important or substantial governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

The same cannot be said, however, of hate crime sentence enhancement laws. In the case of hate crimes, the government's legitimate interest in regulating the nonspeech element is satisfied by punishing an individual's criminal acts. No further need—short of the illegitimate desire to punish objectionable beliefs—therefore justifies sentence enhancement on the basis of the defendant's underlying political motivation.

Finally, the fact that the law commonly takes mental state into account is completely irrelevant to the constitutionality of sentencing enhancement laws. The unique defect of such laws under the First Amendment is that they penalize the holding of a particular political or social attitude. For it is those attitudes that are simultaneously inherently intertwined with the systems of free expression and representative democracy, and most vulnerable to the dangers of political repression.

CONCLUSION

It has not been contended by amici that politically-motivated criminal acts are in any manner protected by the First Amendment. Government has the power—indeed the moral obligation—to protect its citizens from physical harm, whatever the motivation for those acts. But hate crime sentence enhancement in no way makes conduct or behavior criminal that was not already subject to punishment.

It should be emphasized that one may find sentencing enhancement laws to be unconstitutional, yet nevertheless find the existence of racist motivations or attitudes to be personally repugnant. As dangerous and offensive as any expression of racism or bigotry may be, considerably more dangerous is any attempt by the government to control the minds of its citizens.

For the foregoing reasons, this Court should affirm the decision of the Court below.

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Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-515

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

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v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Griggs v. Duke Power Co., 401 U.S. 424 (1971) 23, 24

Kinser v. State, 88 Md. App. 17, 591 A.2d 894 (1991) . . . 11

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Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 112 S. Ct. 501 (1991) . . *passim*

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United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983) 27

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42 U.S.C. § 2000e-5 (1988) 25

42 U.S.C. § 12112 (1990) 23, 25

42 U.S.C. § 12182 (1990) 25

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Wis. Stat. § 941.04 (1990) 13

Wis. Stat. § 943.205 (1990) 13

Wis. Stat. § 943.395 (1990) 13

Wis. Stat. § 948.03 (1990) 13

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H.R. 4797, 102d Cong., 2d Sess. (1992) 9

Bias Crimes: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992) 9

S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1837 29

Cong. Globe, 42d Cong., 1st Sess. 321 (1871) 27

Cong. Globe, 42d Cong., 1st Sess. 478 (1871) 26

114 Cong. Rec. 9559 (1968) 28

MISCELLANEOUS

Arthur W. Campbell, LAW OF SENTENCING (2d ed. 1991) 18, 19

Barbara L. Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983) 24

U.S. Sentencing Commission, FEDERAL SENTENCING GUIDELINES MANUAL (1993 ed.) 20

Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) 24

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BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This amicus curiae brief is submitted in support of respondent, Todd Mitchell. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights. Many of CIR's cases have involved the First Amendment. *E.g.*, *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992). CIR believes that in recent years, governmental entities and courts have circumscribed fundamental First Amendment freedoms in the pursuit of objectives such as social justice, fairness, or sensitivity. This case is another example of such limitations on First Amendment freedoms.

SUMMARY OF ARGUMENT

1. Todd Mitchell committed a brutal, calculated assault on an innocent young boy. No one should doubt that the "First Amendment does not protect [such] violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Under traditional sentencing practices, Mitchell would be punished severely for this crime. That is not the issue here. The issue is whether Wisconsin may also punish Todd Mitchell because of his beliefs. Those beliefs were crude, ugly and unformed. But that does not change matters. Wisconsin punished Mitchell because the contents of his beliefs about race were abhorrent to it. Most Americans share that abhorrence. But the First Amendment does not. It subjects governmental efforts to punish individual beliefs because of their content to the most exacting scrutiny.

2. The Wisconsin statute undeniably imposes punishment because of a defendant's beliefs. Beyond that, the statute's history, language, structure and effect demonstrate that it is content-based: it was directed at a narrow category of beliefs, about controversial public issues, which the State abhors.

3. Because it is content-based, the Wisconsin "hate crime" statute is subject to the most exacting scrutiny. It does not survive. The State cannot claim an interest either in punishing defendants for the content of their beliefs about public issues, nor in punishing a category of conduct defined entirely by the content of the actor's beliefs. The State also cannot justify the statute on the grounds that "discrimination crimes" are a proxy for offenses that involve severe criminal conduct, lack of remorse, future dangerousness, and injury to the victim. If the State wishes to impose harsher penalties for these things, it could do so much more accurately and fairly.

4. The federal civil rights laws confirm the Wisconsin statute's fatal content-based infirmity. None of

the civil rights laws were directed at imposing content-based punishment on individual beliefs. Striking down the Wisconsin statute will not jeopardize federal civil rights protections.

I. CONTENT-BASED REGULATIONS OF INDIVIDUAL BELIEFS ABOUT PUBLIC ISSUES ARE SUBJECT TO EXACTING SCRUTINY

Central to the First Amendment is the rule that "[c]ontent-based regulations are presumptively invalid." *R.A.V.*, 112 S. Ct. at 2542. This general prohibition against content-based regulation of expression and belief is fundamental to American democracy:

> If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating . . .' To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.[1]

No other approach to content-based regulations "'would comport with the premise of individual dignity and choice upon which our political system rests.'"[2]

Thus, this Court has long required the most exacting scrutiny for content-based regulation of protected speech and expressive conduct. Under this standard, the State must demonstrate that a content-based regulation is the least restrictive means of accomplishing a compelling governmental objective.[3]

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[1] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (citations omitted).

[2] *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (quoting *Cohen v. California*, 403 U.S. 14, 24 (1971)).

[3] *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *First Nat'l Bank*

The First Amendment's general prohibition against content-based regulations is not limited to fully-protected speech. The First Amendment also requires exacting scrutiny for content-based regulations of *unprotected* speech and conduct that could be entirely prohibited; for example, the State generally may not enact a content-based prohibition against obscenity or fighting words that discredit government policies, while tolerating other types of obscenity or fighting words.[4] Likewise, even though reasonable time, place and manner limits would permit regulation of a particular category of conduct, content-based restrictions on *some* of that conduct are presumptively invalid; for example, while a State may forbid all picketing, its content-based discrimination between different types of picketing must satisfy the most rigorous scrutiny.[5]

Content-based efforts to regulate individual beliefs are also subject to the most exacting First Amendment scrutiny.[6] "[A]t the heart of the First Amendment is the

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v. Bellotti, 435 U.S. 765, 786 (1978); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Texas v. Johnson*, 491 U.S. 397, 415-17 (1989); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Smith v. Goguen*, 415 U.S. 566, 575-76 (1974).

[4] *R.A.V.*, 112 S. Ct. at 2543. *See also Schacht v. United States*, 398 U.S. 58, 63 (1970).

[5] *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

[6] The First Amendment would require the most exacting scrutiny if a State imposed criminal liability on individuals because they held certain beliefs. *American Communications Ass'n v. Douds*, 339 U.S. 382, 408 (1950) ("one may not be imprisoned or executed because he holds particular beliefs"). The First Amendment would require similar scrutiny of less direct efforts to regulate individual belief. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947) ("Congress may not

notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[7] Governmental efforts to regulate the content of individual beliefs require no less rigorous scrutiny than content-based regulations of fighting words, obscenity, flag-burning or nude dancing. Indeed, although the selective prohibition of unprotected speech "does not pose [the] threat" that the "Government may effectively drive certain ideas" from the marketplace, *R.A.V.*, 112 S. Ct. at 2545 (quotation omitted), the selective punishment of *beliefs* does raise precisely this specter. Beliefs demand protection as a means of safeguarding First Amendment liberties of speech and association—which could be subverted through controls on individual thoughts.

II. THE WISCONSIN STATUTE IS SUBJECT TO EXACTING SCRUTINY BECAUSE IT IMPOSES PUNISHMENT ON INDIVIDUAL BELIEFS

A. The Wisconsin Hate Crime Statute Inquires Into and Imposes Criminal Sanctions Because of Individual Beliefs

The Wisconsin hate crime statute plainly imposes governmental sanctions on individuals because of their

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'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'"); *Rutan v. Republican Party*, 497 U.S. 62 (1990). In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943), this Court rejected the argument that the State had an interest in coercing popular adherence to notions of "national unity": "Authority here is to be controlled by public opinion, not public opinion by authority." *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

[7] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). *See American Communications Ass'n*, 339 U.S. at 442 ("[t]he priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism and we have no claim to it.").

beliefs and motivations. As originally enacted, the statute provided for sentence enhancement if the defendant "intentionally select[ed] the [victim] because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person." Wis. Stat. § 939.645(1)(b) (1988). More recently, the statute was amended to make clear that sentence enhancement must occur when the defendant selected a victim "because of the actor's beliefs or perceptions" regarding the victim's status. Wis. Stat. § 939.645(1)(b) (1992). On its face, therefore, the statute specifically requires an inquiry into the defendant's beliefs—what the State itself terms the defendant's "victim selection process." If that inquiry reveals proscribed motivations or intentions, then the defendant faces substantially enhanced punishment. It is *only* because of, and *specifically* because of, the defendant's "prejudices" that the Wisconsin statute calls for enhanced punishment.[8]

This is confirmed by the statute's practical implementation. In determining whether the defendant has "[i]ntentionally select[ed]" the victim "because of the actor's beliefs" regarding the victim's protected status, the trial court will inevitably inquire into the defendant's beliefs and opinions when committing the crime. Inquiry will also be made into the defendant's associations and friendships, the books and movies he or she has read, watched or rented, and statements he or she has made to others.[9]

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[8] According to the Wisconsin Supreme Court, the Wisconsin law "is directed solely at the subjective motivation of the actor—his or her prejudice." *State v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807, 814 (1992).

[9] A good example is *State v. Ayers*, No. 65276 (Md. Cir. Ct. Feb. 5, 1993), which involved a prosecution under Maryland's "hate crimes" statute. Defendant, a white man, was accused of attacking two black women. Defendant admitted to assaulting the women, but he denied having any racial bias, claiming "I am not a racist." Veronica T. Jennings, *Calling Racial Attack "Savagery," Judge Gives Man 60 Years*, WASH. POST, Feb. 6, 1993, at B1, B4. As support for this position, defendant offered four black friends and a psychologist, who opined that Ayers was not a bigot. *Id.*

A similar inquiry occurred in *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E. 2d 450, *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992). Defendant was indicted for violating Ohio's hate crimes statute, Ohio Rev. Code Ann. § 2927.12 (1987). The defendant testified that he had "associated" with black friends and neighbors, prompting the colloquy set forth in Appendix A.

The Wisconsin statute therefore plainly requires inquiry into, and imposes punishment because of, "the actor's beliefs." Nonetheless, it is suggested that "[n]o First Amendment rights are implicated by [the] statute because it is aimed at discriminatory conduct not speech." Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae, at 2, 4-10. That argument is simply not plausible.

The Wisconsin statute is expressly aimed at "*beliefs and perceptions*," not conduct or speech. It is beyond debate that the First Amendment would be applicable to a penalty enhancement statute that was triggered, for example, whenever the defendant committed an offense "with the intention of promoting independence for Puerto Rico" or "in order to obstruct statehood for the District of Columbia." It is also clear that the First Amendment would extend to a penalty enhancement statute that applied whenever the defendant "intentionally selected the victim because of" the victim's "support for government economic policies," "opposition to the Vietnam war," or "involvement in protests concerning abortion." Like each of the foregoing hypothetical statutes, the Wisconsin statute requires certain conduct to have occurred in order for it to be applicable, but the statute will impose punishment only

if (and precisely *because*) that conduct is accompanied by a defined set of beliefs.[10]

B. The History, Language and Structure of the Wisconsin Statute Demonstrate That it is a Content-Based Regulation of Individual Beliefs

The Wisconsin "hate crime" statute does not merely impose punishment because of individual beliefs and motivations. Rather, under well-established standards for determining content-neutrality, the statute deliberately targets a narrow set of abhorrent beliefs in a content-based manner. This Court recently explained that:

> [t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration.[11]

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[10] The United States argues that "while the Constitution protects the right to harbor and express bigoted ideas, it does not confer the right to commit crimes based on those beliefs." Brief for the United States as Amicus Curiae, at 8. This misses the point. Mitchell claims no right "to commit crimes based on [bigoted] beliefs." He will be punished for such crimes. What he claims instead is that the Constitution does not permit him *also* to be punished because of—only because of and specifically because of—the content of his beliefs.

[11] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Or, "statutes [are] content neutral where they [are] *intended to serve purposes unrelated to the content of the regulated speech*, despite their incidental effects on some speakers but not others." *Simon & Schuster*, 112 S. Ct. at 511 n.** (emphasis added). Of course, it is not necessary to establish that the Wisconsin "legislature intends to suppress certain ideas," *id.* at 509, although we show below that this was in fact the case. Rather, a regulation is content-based if it is designed to "discriminate on the basis of the content" of the message or belief. *Regan v. Time, Inc.*, 468 U.S. at 648-49.

Simply put, content-based regulations are laws that are "directed at" the content or message of particular ideas, speech or conduct. *Texas v. Johnson*, 491 U.S. at 406.

It is clear that the Wisconsin statute is directed at a narrow set of social and political beliefs, about controversial public issues,[12] because of the State's abhorrence of those beliefs. Indeed, the law is but one of nearly 50 similar statutes that have been enacted or proposed around the country during the past decade's wave of concern about bias. For example, a federal "Hate Crimes Sentencing Enhancement" bill specifically targets acts "motivated by hatred, bias, or prejudice" against race, religion and other protected statuses. H.R. 4797, 102d Cong., 2d Sess. (1992). The sponsor of the bill explained: "It is time for the nation to open its eyes and face the truth about the resurgence of bias and hate. . . . It should not go unpunished. The bigots should be put on notice that the rest of us may be tolerant, but we won't tolerate them *or* their actions."[13]

The history, language, and effects of the Wisconsin statute demonstrate that it targeted the same biases. The title of the "hate crime" statute is not coincidental. That name reflects the fact that the law targets crimes where the offender acted because of his or her antagonism towards

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[12] Racial and ethnic differences and animosities have long been among the most sensitive, but important, issues in American public life. It is beliefs and expression concerning such "public issues" that the First Amendment most zealously safeguards. *NAACP v. Claiborne Hardware*, 458 U.S. at 913. Here, the State has singled out, from the entire range of motivations, intentions and beliefs connected with any unlawful conduct, a narrow category of individual thoughts concerning particular social and political issues. It is *that* State-defined category that is content-based and subject to strict scrutiny.

[13] *Bias Crimes: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 2 (1992) (statement of Rep. Schumer) (emphasis added).

persons with a particular status. The "intentional selection" of a victim of violent crime "because of" his race or other protected status will virtually always be inspired by one or several closely-related beliefs—racial resentment or antagonism, bias, or notions of racial separatism or superiority. As the Wisconsin Supreme Court found, the statute is directed squarely at these beliefs: it "commendably is designed to punish—and thereby deter—racism and other objectionable biases."[14]

The statute's legislative history confirms this. The law originated with a Drafting Request by Representative Clarenbach, the bill's sponsor. That request sought a bill to "increase penalties for violence *motivated by bigotry*

[14] *Mitchell*, 485 N.W.2d at 814. The State and several amici urge that the Wisconsin statute does not punish *only* those motivated by status-based bigotry and antagonism. *E.g.*, Brief of Petitioner at 37 (Mitchell "might have been motivated by a desire to appear tough and rebellious to impress his peers"); Brief for American Civil Liberties Union, at 12; Brief for the Lawyers Committee for Civil Rights Under Law, at 15 ("a mugger who attacks only Jews might do so because he thinks that they have more money than others"). As authoritatively interpreted by the Wisconsin Supreme Court, however, the sentence enhancement statute would not apply to these hypotheticals: they are not "hate crimes," nor are they motivated by "racism and other objectionable biases." 485 N.W.2d at 814. The Wisconsin Supreme Court's interpretation of the Wisconsin statute is, of course, binding. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

But even if the statute were *not* so interpreted, the creative hypotheticals suggested by amici do not change the fundamental point that the Wisconsin statute was specifically and deliberately directed at bigotry. The fact that the law also happens incidentally to fall, at its outer reaches, on some beliefs which are not readily characterized as pure bigotry cannot be permitted to conceal its true purpose and overwhelming effect. If this *were* capable of rendering the law content-neutral, States could always escape First Amendment scrutiny simply by drafting legislation that would spill marginally into areas not directly necessary to targeting particular beliefs.

(against protected classes under state law . . . .")[15] Moreover, the statute was later amended to make clear that it was directed at particular status-based biases. As described above, in 1992 the Wisconsin legislature made the law applicable where the defendant intentionally selects his victim "because of the *actor's beliefs or perceptions regarding the*" protected status of the victim. Wis. Stat. § 939.645(1)(b) (1992) (emphasis added). Like other hate crime legislation, the Wisconsin statute was plainly directed at beliefs whose content the legislature abhors.[16]

Most important of all, the unusual structure of the "hate crime" statute, together with the State's untenable justification for the law, make it clear that the statute is content-based.[17] These features of the statute demonstrate

[15] *See* Drafting Request from Rep. Clarenbach (Nov. 12, 1987) [hereinafter "Drafting Request"] (included in drafting record for Wisconsin Act 348, Wisconsin Legislative Reference Bureau).

[16] Lower courts considering similar legislation in other states have concluded that particular "hate crime" statutes are intended to punish class-based bias. *E.g.*, *State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984); *People v. Grupe*, 532 N.Y.S.2d 815 (Crim. Ct. 1988); *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894 (1991).

[17] The Wisconsin statute goes beyond content-discrimination to impose viewpoint-based punishments. Criminal defendants who are motivated by status-based bias receive enhanced punishment. Defendants who commit precisely the same offense, but who are motivated by a crusade *against* bigotry, receive no such punishment. *See* Drafting Request. Thus, while Todd Mitchell faces an enhanced punishment, no additional sentence would be imposed upon someone who murdered Mitchell, not because he was black, but in order to free Wisconsin of bigoted crime. Or, if violence erupted at a demonstration between advocates and opponents of gay rights, only the thugs with proscribed biases would face enhanced sentences. And again, racist intimidation by black separatists or members of the Ku Klux Klan would be punished more heavily than equally aggressive (but non-racist) behavior by those demanding racial harmony. The First Amendment does not permit such discrimination. Recalling *R.A.V.*, the First Amendment does not permit the State to favor those who

that it had to have been directed at punishing abhorrent beliefs; that is the clear, direct effect of the law and it is the only plausible explanation for the statute's structure.

According to the State, "[t]he Wisconsin legislature has determined that discrimination crimes are likely to involve aggravating circumstances warranting higher penalties." Brief of Petitioner at 9. In particular, hate crimes are said to serve as proxies for "more severe offense[s]," "more severe offender[s]," "depravity," "retaliatory crime or copycat crime," "repeat criminal behavior," "lack of remorse," and "public injury." *Id.* at 19-27.

But if these were Wisconsin's objectives, then it would have pursued those goals directly, without adopting the "hate crime" proxy. If Wisconsin wished to punish lack of remorse, repeat offenders, or publicly disturbing crimes, it plainly would not punish Todd Mitchell *because of* his "status-based bias"; it would instead punish him *because of* his lack of remorse, his many other crimes, and his having brutally terrorized an innocent youth and an entire community. But instead of doing this, Wisconsin adopted a flat, across-the-board punishment enhancer that applies—entirely without regard to individual content-neutral circumstances—whenever a proscribed belief is present. That action is simply not consistent with any effort to punish crimes because they are severe, disruptive or likely to recur. But it *is* entirely consistent with an effort to punish bigotry and biased beliefs.

Beyond this, the Wisconsin statute only applies to an *ad hoc* coalition of *some* protected "statuses," which bear little relation to the purportedly content-neutral objectives

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commit violence "*in favor* of racial, color, etc. tolerance and equality" over those motivated by intolerance and bias. 112 S. Ct. at 2548 (emphasis in original).

of the law. Thus, the law singles out only a few types of status—race, religion, and sexual preference—for protection. The law excludes *other* types of status that are *identical* from the perspective of the State's asserted content-neutral justifications for the statute—including gender, age, economic class, membership in political or labor groups, and the like. Why is a brutal rape neither heinous nor likely to shatter the victim's life? Why is a calculated attack on impoverished farmers, because of their status, not likely to terrorize others similarly situated? Why is the shooting of a rival gang member or union rival not likely to provoke retaliation? Why is kidnapping and abusing an elderly person or young child not depraved?

Moreover, the "hate crime" law punishes proscribed beliefs without regard to the underlying crime. By its terms, the law applies to virtually *all* offenses in the Wisconsin Criminal Code, including: mooring watercraft to railroad tracks and fixtures, Wis. Stat. § 941.04; theft of trade secrets, Wis. Stat. § 943.205; presenting false or fraudulent insurance or employee benefit claims, Wis. Stat. § 943.395; and dognapping or catnapping, Wis. Stat. § 948.03.[18] The State's decision to punish bigoted beliefs in *all* cases, without regard to the character or severity of the crime, graphically illustrates that it is *not* "severe" or heinous crimes that the legislature seeks to punish; rather, it is bigotry—wherever it may appear.

Finally, the extremely loose causal nexus that must be satisfied in order to permit enhanced punishment for proscribed beliefs magnifies the impact of the Wisconsin statute on proscribed beliefs. As recently amended, the statute now expressly provides for enhanced punishment whenever the defendant acted "in whole *or in part*" because of his opinions regarding the victim's protected

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[18] A list of some of the criminal offenses to which the Wisconsin sentence enhancement statute applies is attached as Appendix B.

status.[19] As a consequence, punishment enhancement will be imposed on an extremely broad category of defendants, including bigoted thugs whose bigotry had virtually nothing to do with their crimes.[20] This deliberate effort to punish bias in as wide a range of circumstances as possible—even when doing so does not meaningfully advance the State's asserted content-neutral objectives—confirms that the law was directed at those beliefs.

It is true that a legislature may "conclud[e] that some states of mind accompanying the commission of a crime are deserving of special condemnation through enhanced punishment."[21] But the issue is *what categories* of "states of mind" and beliefs a State may subject to "special condemnation." We do not doubt that a State may punish Mitchell's violent intentions[22] nor that it could adopt a punishment enhancer for crimes committed with

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[19] Wis. Stat. § 939.645(1)(b) (1992). This codification merely reflects the Wisconsin Supreme Court's understanding of the unamended statute; even the dissent below interpreted the legislation as applying whenever racial animus played a "substantial part" in the defendant's motivation. *See Mitchell*, 485 N.W.2d at 827 (Bablitch, J., dissenting).

[20] For example, a man who hates Irish Catholics and who gets into a traffic altercation with a priest will be covered by the statute even if the altercation would have occurred with anybody else. Likewise, individuals whose personal or business quarrels lead to violence will face enhanced punishment if even a small "part" of their motivation could be shown to be bias towards a protected status.

[21] Brief of the United States as Amicus Curiae, at 13. *See* Brief of Petitioner at 19.

[22] The State suggests that extending First Amendment scrutiny to the Wisconsin statute would be inconsistent with the inquiry into "intent" required in many criminal contexts. Brief of Petitioner at 14. That is without basis. An inquiry into the defendant's intention to cause a particular act is content-neutral, applicable to the entire range of criminal law and criminal conduct. This time-honored feature of Anglo-American law raises no meaningful First Amendment question.

premeditation, with a firearm, by a repeat offender, or for financial reward. None of these enhancement statutes would even arguably be content-based legislation directed at a particular set of unpopular beliefs about social and political issues. But when a State adopts an enhancement statute that imposes punishment based upon the content of particular beliefs—applying, for example, to all crimes motivated by Communist beliefs or by a desire to protect abortion rights, gay rights or property rights—the First Amendment then properly demands the most exacting scrutiny.

The Wisconsin statute is no different. Rather than punishing defendants for their lack of remorse, their cruelty or their multiple offenses, the Wisconsin statute punishes them for having had particular *proscribed beliefs*; rather than punishing *all* (or many) of the motivations that aggravate criminal offenses, the statute only punishes *certain* unpopular beliefs; rather than enhancing punishment *only* for crimes that are serious or socially harmful, the statute automatically punishes proscribed beliefs in connection with *all* crimes, without regard to the underlying offense; rather than enhancing punishment when the proscribed belief was closely linked to the underlying offense, the statute punishes proscribed beliefs *wherever they exist*, even when they have only a trivial causal relation to the criminal conduct. Given all this, it simply cannot be denied that the Wisconsin statute is directed at the content of proscribed beliefs. That is what the statute says on its face; it is what the law achieves in practice; it is what the statute's sponsors said they intended to accomplish; and it is the only rational explanation for the law's peculiar structure.[23]

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[23] The "hate crime" law was *not* aimed at the "secondary effects" of the status-based biases that it singles out for punishment. *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). First, the content of an idea, even more than the "emotive impact of speech on its audience is

III. THE WISCONSIN STATUTE DOES NOT SURVIVE HEIGHTENED SCRUTINY

Under the First Amendment, content-based regulations are generally subject to the most exacting scrutiny. As we show below, the Wisconsin statute does not survive heightened First Amendment scrutiny.

A. Wisconsin May Not Claim An Interest in Punishing Certain Bigoted Beliefs

Wisconsin may not, of course, claim any interest in punishing certain beliefs because of their content—be they racial antagonism, religious bias, dislike for heterosexuals or homosexuals, or notions of ethnic superiority. These beliefs are crude, ugly and repugnant. They run contrary to progressive America's deepest aspirations. But, above all else, the First Amendment forbids governmental efforts to dictate the content of individual belief. "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[24]

The First Amendment protects the right of individuals to express messages and hold beliefs that are wholly contrary to prevailing American ideals. Americans are free to burn their flag, to subscribe totalitarian or anarchic doctrine, and to reject democracy and equality. Todd Mitchell's crude racist beliefs are no different. "The First

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not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). And, in any event, for all the reasons set out in text, the "hate crime" law simply was not aimed at "secondary effects"—like punishing remorselessness, repeat offenders, severe crimes, etc. The language, structure, history and effect of the law are to punish a proscribed set of beliefs, not objective effects of crime.

[24] *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (overruled by *Girouard v. United States*, 328 U.S. 1 (1946)).

Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination based on race is odious and destructive—will go unquestioned." *Texas v. Johnson*, 491 U.S. at 418.

Nor may Wisconsin avoid this result merely by asserting an interest in punishing a category of conduct that is *defined solely by the proscribed content of beliefs* held by the actor. Thus, the State claims an interest in enhancing punishment for a "subset [of criminal conduct that] is made up of criminal conduct that occurs because of the discriminatory motive of the actor." Brief of Petitioner at 8. This merely redefines the State's disagreement with particular ideas as disagreement with conduct *because of its motivating ideas*.[25] Although the State may have legitimate content-neutral reasons for preventing a class of conduct defined solely by the beliefs motivating that conduct, it must articulate and defend those reasons—not merely restate its ideological preferences. As this Court has observed elsewhere, the State "has taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute." *Simon & Schuster*, 112 S. Ct. at 510 (emphasis in original).

B. Wisconsin's Asserted Content-Neutral Objectives Are Not Meaningfully Advanced By The Hate Crime Statute

The State offers a variety of content-neutral objectives that it asserts will be furthered by the Wisconsin statute. In particular, the State urges that "discrimination crimes" are a useful proxy for offenses that involve severe crimes, future dangerousness, retaliatory actions, copycat crimes,

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[25] *See, e.g.*, Brief of Petitioner at 22-23 ("Criminal acts take on a heinous quality simply because they are motivated by a desire to discriminate").

lack of remorse, and injury to the victim and society.[26] Punishing offenses with these features is a compelling end. However, "[i]t is not the State's ends, but its means, to which we object." *Texas v. Johnson*, 491 U.S. at 418. Here, it simply cannot credibly be maintained that the proxy selected by Wisconsin is either narrowly tailored or reasonably necessary to achieving these ends.

First, traditional criminal sentencing mechanisms provide a tested means of achieving the State's asserted content-neutral objectives which is both more effective and fairer than Wisconsin's proxy. Sentencing has long involved wide-ranging inquiries into the offender's character and offense: the sentencing authority "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider."[27] Moreover, traditional sentencing mechanisms (and modern sentencing guidelines) allow criminal punishments to be tailored to the individual defendant and his or her offense. *Williams v. New York*, 337 U.S. at 248-49 & n.10; *Lockett v. Ohio*, 438 U.S. 586, 602-05

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[26] Brief of Petitioner at 9-10, 19-27. The State also asserts that "[i]f a particular type of crime begins to occur more frequently, that fact alone warrants increased penalties to achieve a greater deterrent effect." *Id.* at 9. That is plainly wrong. A State could not enhance punishments for increasingly prevalent crimes by civil rights protesters, Democrats or Muslims, or for crimes where the actor's intention was to frustrate a particular governmental policy or further an ideology. The State's assertion amounts to the untenable claim that the Constitution imposes no limits on its power to categorize "particular type[s] of crime," even where that categorization is designed to suppress particular beliefs because of official disagreement.

[27] *United States v. Tucker*, 404 U.S. 443, 446 (1972). *See Williams v. New York*, 337 U.S. 241, 246-48 (1949); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991). The sentencing process is accurately described as an "omnivorous" process. *See* Arthur W. Campbell, LAW OF SENTENCING § 10:1 at 307 (2d ed. 1991).

(1978). Thus, the State has a ready, workable mechanism to directly consider and punish—based upon the actual facts of particular cases—each of the content-neutral interests purportedly served by the Wisconsin law.[28] That is a much superior way of achieving these goals than Wisconsin's rough proxy.[29]

If the State wishes to impose harsher sentences for remorseless defendants or repeat offenders, it can do so directly, by asking whether Mitchell was remorseless and whether he has a criminal record. Or if the State wishes to punish brutal and depraved crimes, it can do so more accurately by looking at the brutality of Mitchell's individual offense. Under this approach, the savage, calculated beating of a helpless teenager by Mitchell and a dozen men—who had never laid eyes on their victim before and who had no cause for anger or animosity—would receive the most severe punishment. The terror that such attacks inflict on all citizens, and the devastating effect of Mitchell's crime on Gregory Riddick, would demand the strongest deterrence. Punishment for each of these aspects of Mitchell's crime is already available under our criminal justice system, without resorting to the manifestly inaccurate proxy of an arbitrary set of "status-based biases." What the traditional sentencing process does *not*

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[28] In considering whether to enhance a penalty, federal and state courts look to a broad range of considerations, including effects on the crime victim, the vulnerability of the victim, threat to public safety, whether the defendant has shown remorse, defendant's dangerousness, defendant's tendency to recidivism, presence of coercion, abuse of office or trust, the brutality of the crime, and the threat to national security. *See generally* Campbell, LAW OF SENTENCING at 306-07.

[29] Traditional sentencing mechanisms also provide a fairer means of determining criminal punishments. Inquiry can be made into relevant issues on the record with an opportunity for rebuttal. Defendants are not faced with the extraordinary stereotype, *see* Brief of Petitioner at 24-25, that they are repeat offenders, remorseless, or likely to commit future crimes because of their social and political beliefs.

do, however, is impose special punishments "because of" the content of the defendant's "beliefs." For this, Wisconsin required the hate crime statute. And it is precisely this that the First Amendment does not permit.

C. *Dawson v. Delaware* Demonstrates That the Wisconsin Statute is Unconstitutional

There is no merit to claims that the constitutionality of the Wisconsin law is supported by *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). On the contrary, *Dawson* demonstrates why the statute is unconstitutional.

Although the sentencing process has historically required wide-ranging factual inquiries, it has never involved sweeping content-based efforts to punish particular beliefs. Thus, both traditional sentencing decisions and the contemporary guidelines look to content-neutral factors such as lack of remorse, repeat offender status, effects on the community, and the like.[30] They do not consider the content of a defendant's social and political beliefs, not even as only one of many relevant sentencing factors. Indeed, as *Dawson* illustrates, the First Amendment does not permit any such content-based scrutiny of particular beliefs, much less the sweeping punishment imposed by the Wisconsin statute.

Dawson held that the First Amendment forbade the admission into evidence at sentencing of the defendant's membership in a prison gang known for its unlawful activities and racist ideology. Chief Justice Rehnquist declared that the evidence "proved nothing more than Dawson's abstract beliefs," 112 S. Ct. at 1098, and that the First Amendment barred use of evidence simply to

[30] *See United States v. Kikumura*, 918 F.2d 1084, 1098 (3d Cir. 1990); U.S. Sentencing Commission, FEDERAL SENTENCING GUIDELINES MANUAL 239 *et. seq.* (1993 ed.).

show that the defendant's views are "morally reprehensible." *Id.*

Dawson went on to suggest that the defendant's membership in a racist gang might have been admissible if it had been more directly relevant to a content-neutral aggravating circumstance. "In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* Justice Thomas's dissent put things even more clearly. He emphasized that the Court does not "sit in judgment of the morality of particular creeds," but nonetheless would have admitted evidence of the defendant's gang membership. That, however, was *only* because he concluded that, under traditionally relaxed rules of relevancy and proof in sentencing inquiries, Dawson's membership suggested that he had engaged in "forbidden activities while in prison," *id.* at 1101, was a likely candidate for "future dangerousness," *id.*, and had a "violent" and "vicious" character.

The First Amendment limitations that the Court unanimously recognized in *Dawson* illustrate why the Wisconsin statute is unconstitutional. *Dawson* involved the admissibility of the defendant's gang membership, which in turn suggested that the defendant held several reprehensible beliefs. The disputed evidence was only one small part of a large body of facts and legal argument, on many subjects, that was presented at sentencing to the decisionmaker. Permitting such a wide range of evidence served important time-honored goals of the criminal justice system, including assuring that the defendant can present mitigating evidence.[31] But even this very indirect burden upon the defendant's various beliefs in *Dawson* was held unconstitutional save where defendant's membership could

[31] *See Williams v. New York*, 337 U.S. at 249; *Lockett v. Ohio*, 438 U.S. at 604-605.

be directly linked to content-neutral aggravating circumstances.[32]

It necessarily follows from *Dawson* that Wisconsin's flat, across-the-board sentence enhancement for all crimes motivated even in part by status-based bias is unconstitutional. The Wisconsin law does not merely sanction admission of one piece of evidence, bearing indirectly on several of the defendant's ideas. It singles out one particular political and social belief itself, and then, *based solely upon the content of that belief*, automatically and substantially increases punishment. By focusing specifically on the defendant's belief, and by then imposing punishment enhancement entirely because of the proscribed *content* of that belief, the Wisconsin law strikes directly into the heart of the First Amendment's protections in a way that the proceedings in *Dawson* did not even remotely approach—but which the rationale of *Dawson* clearly does not permit.

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[32] Similarly, in *Barclay v. Florida* this Court held that the Constitution does not prohibit taking racial motive into account, *when that racial motive is relevant to statutory aggravating factors*. 463 U.S. 939, 949 (1983). In *Barclay*, the defendant was a member of the Black Liberation Army, "'whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.'" *Id.* at 942. The trial court considered this motive "in the course of finding the 'great risk of death to many persons,' 'disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws,' and 'especially heinous, atrocious, or cruel' statutory aggravating circumstances." *Id.* at 949-50 n.7. Thus, like *Dawson*, *Barclay* permitted consideration of racial motive only because the motive was relevant to a neutral factor normally considered in the course of sentencing.

IV. COMPARISON WITH CIVIL RIGHTS LAWS CONFIRMS THAT THE WISCONSIN STATUTE IS UNCONSTITUTIONAL

The State and several *amici* suggest that striking down the Wisconsin hate crime statute would jeopardize a host of federal civil rights laws. As we show below, this is baseless: unlike the Wisconsin statute, the federal civil rights laws are clearly content-neutral. Although concerns about status-bias might have been a factor in some legislators' minds, and although some federal civil rights laws might in some cases have incidental effects on individual beliefs, this does not trigger strict scrutiny. The First Amendment dictates heightened scrutiny when an enactment is directed by the legislature at the *content* of particular ideas or beliefs.[33] That is plainly not the case with the federal civil rights laws.

The fundamental differences between the Wisconsin statute and the civil rights laws are exemplified by Title VII. Title VII addresses discrimination by an employer on the basis of race, sex or certain other characteristics in regard to "employment practice[s]."[34] Thus, within a single, carefully defined field—employment—Title VII targets the *effects* of discrimination.[35] This legislative purpose is carried out in significant part through the medium of disparate impact cases, which do not even

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[33] *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord United States v. O'Brien*, 391 U.S. 367, 382-86 (1968).

[34] 42 U.S.C. § 2000e-2 (1988). Employment discrimination laws regarding persons with disabilities, 42 U.S.C. § 12112, are content-neutral and narrowly tailored for the same reasons as Title VII.

[35] Thus, Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

inquire into the motivations of the employer; they focus entirely on objective indicia of unequal treatment, without regard to subjective mental state.[36]

Even in disparate treatment cases under Title VII, employment discrimination—unlike violent crime—stems from a wide variety of motivations and beliefs, of which status-based antagonism is only one. For example, Title VII affects employers who have commercial concerns about pleasing customers; paternalistically believe women should be protected instead of being exposed to "men's jobs;" affirmatively prefer to help fellow members of their own community—be it racial, religious, national or geographic—instead of others of different groups; passively accept traditional stereotypes that certain groups are frail, unintelligent, weak or lazy; or are overly affectionate (sexual harassment). Title VII falls on each of these various beliefs only in a haphazard and partial manner, and would have been a peculiarly ill-designed way for Congress to have sought to suppress any of those beliefs.

Other aspects of Title VII's structure also differentiate it from the Wisconsin Statute and belie any effort to punish particular beliefs. Among other things, Title VII typically applies not to individuals (who actually hold beliefs), but to corporations and businesses (that do not). 42 U.S.C. § 2000e(b) (1988) (limiting application to employers of at least 15 persons). And Title VII's relief is primarily compensatory—making victims whole—instead of punishing

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[36] 42 U.S.C. § 2000e-2(k)(l) (1988); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 430-32; Barbara L. Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 5 (2d ed. 1983) (calling *Grigg*'s establishment of the disparate impact doctrine "the most important decision in employment discrimination law."); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 951-52 (1982) (explaining why the disparate impact doctrine has had such a large impact on employment discrimination law).

the perpetrator. 42 U.S.C. § 2000e-5 (1988). Title VII simply is not a plausible means by which Congress would have sought to punish unpopular individual beliefs.

So it is with the overwhelming majority of other federal discrimination statutes. Whether they are targeted at employment, places of public accommodation, housing or the exercise of certain individual rights, these statutes are content-neutral. Like Title VII, these laws are narrowly focused on vindicating essential rights in specific areas, not on broadly punishing beliefs.[37] Also like Title VII, these statutes generally do not require proof of subjective motivation,[38] and, even when such motivation is relevant, the statute is triggered by a wide range of beliefs about the protected status.[39] Moreover, many of these

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[37] *See* 42 U.S.C. § 2000a(a) (1988) (public accommodation); 42 U.S.C. § 12182 (1990) (public accommodation "on the basis of disability"); 42 U.S.C. § 12112 (1990) (employment disability); 42 U.S.C. § 1981 (1988) (civil rights); 42 U.S.C. § 1982 (1988) (real and personal property); 42 U.S.C. § 3604 (1988) (housing).

[38] For example, 18 U.S.C. § 241, which outlaws conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," was aimed at the content-neutral objective of preserving individual rights; it specifically does *not* require proof of some proscribed belief or animus. *See United States v. Guest*, 383 U.S. 745, 760 (1966) ("whether or not motivated by racial discrimination"); *United States v. Kozminski*, 487 U.S. 931, 941 (1988); *see also* 18 U.S.C. § 242 (1988); 42 U.S.C. § 1983 (1988).

[39] Persons with disabilities may face discrimination in employment under 42 U.S.C. § 12112 or in the enjoyment of places of public accommodation under 42 U.S.C. § 12182 because of factors such as paternalism, concerns about customers, and fiscal concerns. Persons may face discrimination in housing under 42 U.S.C. § 3604 or 42 U.S.C. § 1982 because of factors such as concern about property values, a desire for quiet (discrimination against families with children), fiscal concerns in providing access to the disabled, and beliefs by realtors that persons of certain race "prefer" certain neighborhoods.

laws have particular exceptions or elements that are inconsistent with an intention of punishing particular beliefs.[40] In short, as with Title VII, these laws were plainly not intended as—and manifestly cannot serve as—punishment for proscribed beliefs.[41]

Two federal civil rights laws appear, albeit only superficially, to be less dramatically different from the Wisconsin statute. First, 42 U.S.C. § 1985(3) creates a private cause of action against persons who conspire to deprive any person or class of persons of the equal protection of the laws. As enacted by Congress, the section focused on the content-neutral objective of guaranteeing all persons equal rights under law. In the words of Representative Shellabarger, who sponsored the legislation, "[t]he object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens." Cong. Globe, 42d Cong., 1st Sess. 478 (1871). Unlike the Wisconsin statute, nothing in the

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[40] For example, the laws regarding places of public accommodation also do not extend to "a private club or other establishment not in fact open to the public, . . .," *id.*, at § 2000a(e), nor to any lodging establishment which "contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence," *id.*, at § 2000a(b)(1). Moreover, whereas the Wisconsin statute indiscriminately punishes motivations based on the same statuses across the board, the federal civil rights laws apply for a particular status only in areas where the effects of discrimination based on that status have been especially destructive. *See* 42 U.S.C. § 3604 (1988) (only housing laws include "familial status"); 42 U.S.C. § 2000a(a) (1988) (does not include gender).

[41] Several other federal civil rights statutes include "state action" requirements. *See* 42 U.S.C. § 1983 (1988); 18 U.S.C. § 242 (1988). The constitutionality of limitations on state officials, acting under color of state law, presents an entirely different set of First Amendment issues, which are in no way implicated by the criminal punishment of a purely private citizen for a purely private crime. *See Rankin v. McPherson*, 483 U.S. 378 (1987).

text of § 1985(3) called for any showing of status-based animus.

Moreover, the structure of § 1985(3), as with the other civil rights laws, reflects its focus on preserving "equal rights under law" rather than on status-based hatred. Section 1985(3) only calls for inquiries into class-based animus where private conspirators *also* had an "intent to deprive persons of a right guaranteed against private impairment."[42] This Court's decisions in *Bray* and *Carpenters* emphasize that there are "few such rights," and those that have been recognized are primarily directed at the Thirteenth Amendment.[43] And, perhaps most importantly, this category of cases at which section 1985(3) was directed were those where, in the post-Civil War South, the legal systems of the States had proven wholly unable to provide justice.[44] This narrowly-tailored response, in a carefully defined set of cases, to a problem that could not otherwise be addressed, simply cannot be regarded as an effort to seek out and punish individual beliefs.[45]

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[42] *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 762 (1993); *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983).

[43] *Bray*, 113 S. Ct. at 764.

[44] *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (statement of Cong. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminal"); *id.* at 155-58 (statement of Sen. Sherman) (detailing repeated failures of state authorities to protect individual rights).

[45] Various amici observe that, in *Griffin v. Breckenridge*, this Court implied into § 1985(3) an additional requirement that the plaintiff prove race or other class-based animus. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Carpenters*, 463 U.S. at 833; *Bray*, 113 S. Ct. at 759. That new requirement is nowhere suggested, even indirectly, in § 1985(3)'s language and it is at best only tenuously linked to the provision's legislative history. Rather, the *sole* reason for the Court's

The same is true of 18 U.S.C. § 245. Section 245 imposes criminal penalties on any person who "by force or threat of force wilfully injures, intimidates, or interferes with" any other person "because of his race, color, religion or national origin and because he is" attending public school, receiving public benefits, seeking employment, or engaging in certain other protected acts.[46] Unlike the Wisconsin "hate crime" statute, § 245 does not reflect a legislative effort to target certain beliefs because they are abhorrent. Such an effort would not be made through the ill-suited vehicle of a statute that requires proving: (a) the use of force or threat of force, (b) that wilfully injures or intimidates, (c) a person *both* because of his race *and* his enjoyment of certain defined public benefits. Section 245 is relatively carefully-crafted to address a narrow and specific set of problems; it does not simply attach punishment to bigotry wherever it can be found.[47]

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construction in *Griffin* was its concern that such a requirement was essential to avoid the "constitutional shoals" that the statute faced when extended to private persons. *Griffin*, 403 U.S. at 102; *Bray*, 113 S. Ct. at 759. This history does not even remotely suggest that Congress enacted § 1985(3) with the "purpose" of targeting unpopular beliefs because of their content. *Ward*, 491 U.S. at 791. Rather, it was this Court that adopted the animus element for constitutional reasons wholly unrelated to any notion of punishing individual beliefs.

[46] The same analysis applies to 42 U.S.C. § 3631(a) (1988) (making it unlawful to wilfully injure, intimidate or interfere with a person in regard to specific housing-related actions because of their race, color, religion, sex, handicap, familial status, or national origin), which was enacted in the same statute as § 245.

[47] *See* 114 Cong. Rec. 9559 (1968) (under section 245, "[e]ach area of protected activity is specifically described.") (statement of Congressman Celler, Chairman of the House Judiciary Comm.). Indeed, the bill that was to become section 245 was revised to require that the interference under section 245 be "because" the person is engaged in the protected activity instead of the prior language of "while he is lawfully" engaged in the protected activity. Otherwise:

Moreover, the reason Congress chose to address the problems was demonstrably *not* to punish beliefs, but was instead to deal with an issue that the existing criminal justice system in the States could not redress. As the legislative history of Section 245 recounts:

> Racial violence almost invariably involves a violation of State law . . . . In some places, however, local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases—even where the facts seem to warrant. As a result, there is need for Federal action to compensate for the lack of effective protection and prosecution on the local level.

S. Rep. No. 721, *reprinted in* 1968 U.S.C.C.A.N. at 1839-40. In contrast, the Wisconsin statute is directed entirely at certain biases, wherever they occur in the criminal field (without regard to causal linkage), even though the existing, content-neutral criminal justice system provides a superior means of punishing wrongdoers.

* * *

In dissent, Justice Bablitch asked, "How can the Constitution not protect discrimination in the selection of a victim for discriminatory firing . . . and at the same time protect discrimination in the selection of a victim for criminal activity?" *Mitchell*, 485 N.W.2d at 820. The answer is plain: the Constitution does not protect employers who discriminate from actions under content-

---

> The statute may have swept too broadly . . . in light of the wide scope of some of the categories of protected activities. For example, the bill could have been read as making criminal any racial assault against someone while he is employed, or [engaged in other protected activity].

S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1837, 1844.

neutral civil rights laws any more than it protects defendants from prosecution and sentencing under content-neutral criminal laws. Todd Mitchell *can and should* be punished because his offense was brutal, remorseless, unprovoked and terrifying. What the First Amendment does not permit is what the Wisconsin statute does—namely, to punish a defendant *because of* the content of his beliefs.

CONCLUSION

For these reasons, the judgment of the Wisconsin Supreme Court below should be affirmed.

Respectfully submitted,

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APPENDIX A

Transcript of Testimony in *State v. Wyant*, No. 89-CR-92 (Ct. Common Pleas, Delaware Cty. Ohio 1989) at pg. 251.

Q: And you lived next door to [Mrs. Ware, a 65-year old black neighbor of Wyant's] for nine years and you don't even know her first name?

A: No.

Q: Never had dinner with her?

A: No.

Q: Never gone out and had a beer with her?

A: No.

Q: Never went to a movie?

A: No.

Q: Never invited her to a picnic at your house?

A: No.

Q: Never invited her to Alum Creek?

A: No, she never invited me nowhere, no.

Q: You don't associate with her, do you?

A: I talk with her when I can, whenever I see her out.

Q: All these black people that you have described that are your friends, I want you to give me one person, just one who was a really good friend of yours.

A: Kenny Redman.

APPENDIX B

Selected Wisconsin Statutes Applicable Under the Wisconsin "Hate Crimes" Statute

Wis. Stat. § 944.06 (incest)

Wis. Stat. § 945.02 (gambling)

Wis. Stat. § 946.06 (flag desecration)

Wis. Stat. § 946.10 (bribery of public officers and employees)

Wis. Stat. § 941.01 (negligent operation of vehicle)

Wis. Stat. § 941.03 (obstructing highways)

Wis. Stat. § 941.23 (carrying a concealed weapon)

Wis. Stat. § 941.034 (using fluoroscopic or X-ray machine for the purpose of shoe-fitting)

Wis. Stat. § 941.36 (fraudulently tapping electric wires or gas or water meters or pipes)

Wis. Stat. § 943.27 (knowingly possessing records of usurious loans)

Wis. Stat. § 943.38 (forgery)

Wis. Stat. § 946.31 (perjury)

Wis. Stat. § 946.46 (encouraging probation or parole violations)

Wis. Stat. § 946.61 (bribing witnesses)

Wis. Stat. § 946.68 (simulating legal process)

Wis. Stat. § 948.04 (leading animal from motor vehicle)

Wis. Stat. § 948.10 (sale of baby rabbits, chicks and other fowl)

Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-515

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TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

AMICUS CURIAE BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL IN SUPPORT OF THE RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICUS CURIAE

The Wisconsin Freedom of Information Council submits this brief as amicus curiae in support of the respondent, Todd Mitchell.[1]

The Wisconsin Freedom of Information Council ("FOIC") is a 24-member association representing the Wisconsin electronic and print media and the public. Devoted to the protection of the First Amendment, the FOIC monitors and speaks out against governmental actions that threaten the First Amendment freedoms of its members and the public. The FOIC believes that all

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[1] The amicus curiae has filed with the clerk letters from counsel for both parties documenting their consent to the submission of this brief.

branches of government and, especially, the courts must be vigilant against any encroachment on First Amendment guarantees of free speech, thought, expression and association.

Penalty enhancement legislation, no matter how well-motivated, collides with the First Amendment. The Wisconsin Supreme Court's invalidation of § 939.645[2] was

[2] Wis. Stat. § 939.645 has been amended, but most of its amendments are not at issue on this appeal. At the time of Todd Mitchell's conviction, § 939.645, Wis. Stats. (1989), read as follows:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

With § 939.645, the Wisconsin legislature also enacted § 943.012, forbidding criminal damage to religious and other property, and

courageous jurisprudence that properly recognized the statute's insidious erosion of First Amendment values. *State v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807 (1992). With this brief, the FOIC urges affirmance of that decision and asks that this Court, too, exercise the vigilance necessary to protect cherished principles from a well-intentioned but misguided effort to cure an admittedly odious social problem.

SUMMARY OF ARGUMENT

Hate crimes are repugnant to a free society. However, any effort to reduce or eliminate hate crimes through penalty enhancement statutes, though well-meaning, is misguided. Enactment of penalty enhancement statutes punishes constitutionally-protected viewpoints which, though socially unpopular and disfavored, are constitutionally protected. Government punishment of biased opinion is the first step toward thought control.

The government's attitude toward viewpoints, even those based on hatred of social and political groups, must remain neutral under the First Amendment. This statute is not neutral because it regulates viewpoints about certain subjects but not others.

The statute before the Court is overbroad. The statute penalizes protected thought and, because of the way it is enforced, constrains the exercise of protected speech and association by using evidence of the defendant's expression, speech and association to somehow prove intentional selection of the victim.

Even if the statute were deemed to regulate conduct rather than speech, it must be strictly scrutinized because it affects First Amendment interests and because the

§ 895.75, creating a private right of action to recover special and general damages as well as emotional distress and punitive damages caused by hate crimes. *See* 1987 Wis. Act 348.

government's interest in enforcing the regulation is related to the suppression of constitutionally-protected thoughts and ideas. The statute is not narrowly tailored to the government's goal of eradicating hate crimes because sufficient means are available to prevent and punish hate crimes without sacrificing First Amendment protections.

ARGUMENT

The proliferation of hate crimes is repugnant to most people. Society should try—and does try—to foster tolerance and harmony among its many groups. Indeed, the fundamental mission to "form a more perfect union, establish justice, insure domestic tranquility . . . promote the general welfare, and secure the blessings of liberty to ourselves and posterity" demands that the country persevere in that endeavor. *See* U.S. Const., preamble.

The pressure to "do something" to eliminate hate crimes is strong. Yet, what government chooses to do in the interest of peace, harmony, and the protection of its citizenry cannot trammel upon equally valuable constitutional protections that are as important to the nation's long-term general welfare and liberty.

This debate is fundamental because it pits one constitutional goal—the eradication of discrimination embodied in the Thirteenth, Fourteenth and Fifteenth Amendments—against another—the guarantee of free thought and expression embodied in the First Amendment.

Hate crimes legislation sacrifices the First Amendment —the source of freedom from which all other liberties flow—to current societal pressures. It represents the first step in the perilous journey toward thought control and punishment of beliefs and ideas in violation of the First Amendment and overbreadth principles.[3]

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[3] The statute also is flawed on vagueness and equal protection grounds, but the FOIC leaves those arguments to the respondent.

I. WISCONSIN'S HATE CRIMES STATUTE VIOLATES THE FIRST AMENDMENT'S PROHIBITION AGAINST PUNISHING THOUGHT.

A. Characterizing The Statute As A Regulation Of Conduct Is Not The End Of The Analysis.

The State argues that because § 939.645 merely regulates conduct, its First Amendment implications are minimal. Br. of Pet. at 38; *see also Mitchell*, 485 N.W.2d at 821-22 (Bablitch, J., dissenting). While governmental regulation of conduct is permissible where that regulation incidentally affects First Amendment interests, *United States v. O'Brien*, 391 U.S. 367, 376 (1968), regulation of conduct is not permissible where the regulation affects First Amendment interests *and* the government's interest in regulation is related to the suppression of expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

Thus, characterizing the penalty enhancer as merely the regulation of conduct does not save it. The Court must take the next step in the analysis and determine whether the government's principal interest in enforcing § 939.645 is in suppressing thought or beliefs. Since the government's only interest in enforcing § 939.645 is to suppress animus in connection with certain groups, the statute, when strictly scrutinized, must fall. *Id.* at 412.

B. The First Amendment Prohibits Punishment Or Control Of Thought.

The First Amendment's guarantee of free speech is silent on the status of free thought. Recognizing that freedom of speech is meaningless without freedom of thought, however, this Court has made it clear that free speech presupposes freedom of thought. Freedom of speech cannot be limited to the spoken word; it necessarily includes freedom to think, to believe, to disagree. *See Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (First Amendment prohibits punishment for concealing license plate state motto from view because of conflict with re-

ligious beliefs); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[T]here is no such thing as a false idea."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (First Amendment forbids forced recitation of the pledge of allegiance).

> [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (public school teacher cannot be required to pay union dues to advance causes he does not believe in).

Thus, while the United States Constitution and federal statutes require the government to eliminate racism, for example, from its own "speech" and conduct, *see, e.g.*, Fourteenth Amendment; 18 U.S.C. § 242, it cannot cleanse racist thoughts from the minds of its citizens even in furtherance of its own legitimate goal of eradicating racism. It cannot order or control thought in compliance with governmental objectives.

> Bigotry and hatred in the fields of race and religion reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to that special commandment "that ye love one another." But no means has yet been found or attempted to compel this highly commendable viewpoint by law. Obviously to do so would border very closely on thought control, which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know.

City of Cincinnati v. Black, 8 Ohio App. 2d 143, 146-47, 220 N.E.2d 821, 824 (1966).

Punishing hate appears morally attractive because we are socialized in that direction. Government sanctions will be only as "moral," however, as the government in power.

> Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful . . . . "Above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas . . . ."

American Booksellers, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986), *reh. denied*, 475 U.S. 1132 (1986) (citations omitted). The First Amendment protects citizens from the tyranny of the good- as well as the bad-thinking powers-that-be by requiring that government, in all cases, remain neutral regarding its criminalization of thought.

> [F]rom a governmental perspective . . . there can be no such things as "good" and "bad" speech or "right" and "wrong" ideas. If a structure of speech protection permits government to make such judgments, then the only real question is "Who is in power?"
>
> . . . .
>
> Our society's commitment to free speech . . . rejects the notion that those in power can regulate expression on the basis of their assessment of right and wrong. Rather, our system is premised on [a] "veil of ignorance." Rules of behavior are established without knowing who will have power and who will not. Under this "bet-hedging" model, we have chosen not to allow those in power to employ their personal substantive moral judgments as a basis for determining the protection of free speech.

Martin Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 Crim. Just. Ethics 29, 33 (1992) ("Redish"). Yet, the Wisconsin penalty enhancement statute attempts to do just that, to let those in power impose their moral viewpoint, to control "bad" thought by punishing "bad" thought.

In *Stanley*, this Court invalidated a state statute making it a crime to possess obscene literature in one's home.

> [I]n the face of . . . traditional notions of individual liberty, [the state] asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

Id. at 565-66 (footnotes omitted).

Punishment of thought is an Orwellian nightmare. Penalty enhancement legislation opens the door to the investigation and criminalization of motivation, ideas, and sentiments, whatever their stripe.

C. The Statute, Which Is Not Limited to Violent Crimes, Enhances The Punishment Of Those Who Hate Certain Groups But Not Those Who Hate Unprotected Groups Or Don't "Hate" At All.

The Wisconsin statute criminalizes a defendant's thoughts and ideas by enhancing his or her penalty based on animus toward or criticism of the protected groups.[4] To foster state-approved thoughts of harmony among members of different social groups, the state identifies criminals who don't share those thoughts and punishes them more severely.

[4] It must be assumed that the punished viewpoint is hatred, bigotry or similar animus. *See Mitchell*, 485 N.W.2d at 812-13. To assume otherwise only accentuates the statute's vagueness, for it is not easy to envision the punishment of criminal conduct motivated by love or goodwill.

The danger in the penalty enhancement scheme is compelling. Statutes enhancing penalties for crimes committed "because of" racial or religious bigotry, gay-bashing, or ethnic tension, for example, cannot be distinguished conceptually from statutes enhancing penalties for crimes committed "because of" other political or social viewpoints, for example, political party affiliation.

This Court has invalidated the notion that government can carve out and regulate only some kinds of viewpoint speech. The state cannot isolate only a few categories of disfavored thought and criminalize them. "The government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government," *R.A.V. v. City of St. Paul*, —— U.S. ——, 112 S.Ct. 2538, 2543 (1992) (emphasis in original), because this amounts to content-based regulation, which violates the First Amendment. *Id.* at 2542-43; *see also New York v. Ferber*, 458 U.S. 747, 763 (1982); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. ——, 112 S.Ct. 501 (1991); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The *R.A.V.* Court struck down a Minnesota anti-cross-burning statute on this basis because it applied only to "fighting words" that insulted or provoked "on the basis of race, color, creed, religion or gender."

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose

> special prohibitions on those speakers who express views on disfavored subjects.

R.A.V., 112 S.Ct. at 2547.

If one analogizes the hateful motives that trigger § 939.645 to "fighting words," then, under *R.A.V.*, the statute is invalid. Section 939.645 criminalizes bias toward certain groups and not others, an inherently content- and viewpoint-based regulation. Justice Scalia, writing for the Court in *R.A.V.*, applied this principle to "fighting words"—a category of speech generally proscribable. No less protection should be afforded § 939.645 because it also affects political thought entitled to the fullest protection.

This thought control statute paves the way for regulation of other thoughts. If § 939.645 is constitutional, then so are these, for now, hypothetical statutes:

- You serve more time if you select your crime victim—a Republican—because of her political views, with motive being evidenced, for example, by your membership in the Democratic Party.
- You serve more time if you select your crime victim—an evolutionist—because of his scientific views, with motive being evidenced, for example, by your membership in a creationist organization.
- You serve more time if you select your crime victim—an abortion foe—because of her privacy views with motive being evidenced by your participation in a pro-choice rally.
- You serve more time if you select your crime victim—a capitalist—because of his economic views, with motive being evidenced, for example, by your attendance at a Marxist rally.

While hate crimes are a deplorable facet of modern society, the Court should consider the constitutional risk of addressing the problem by creating a new one—the erosion of First Amendment prohibitions against viewpoint discrimination. Criminalization of certain viewpoints undercuts the principles that foster fearless, full and robust debate and expression about all viewpoints—including the disgusting and the unpopular.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. at 414; *see also* R.A.V., 112 S.Ct. at 2568 (Steven, J., dissenting) ("Viewpoint discrimination is censorship in its purest form").

II. WISCONSIN'S HATE CRIMES STATUTE IS UNCONSTITUTIONALLY BROAD BECAUSE IT PUNISHES PROTECTED THOUGHT AND INHIBITS PROTECTED SPEECH AND ASSOCIATION.

A. The Statute Punishes Private Thoughts And Ideas That Are Fully Protected By The First Amendment.

A statute is void for overbreadth when it sweeps protected expression and association within its ambit and has a substantial chilling effect on the exercise of protected expression. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *see Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974).

Speech is accorded a hierarchy of protections. *Compare* protection of obscenity, libel, and fighting words, *with* protection of political speech. Thought, on the other hand, knows no such hierarchy. Any theory short of full protection of all thoughts and ideas is inimical to basic constitutional ideals. Thus, the penalty enhancement statute is fundamentally overbroad in that *everything* within its sweep—biased thought—is protected by the First Amendment and not subject to regulation or punishment.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 642.

Commission of an underlying crime is punishable by the state in the exercise of its police power. At the same time, the First Amendment forbids punishment of speech or thought, even bigoted speech or thought. Combining criminal conduct with protected speech does not protect the mixture from punishment—commission of theft, for example, when motivated by bias or prejudice, is not in its totality expressive conduct protected by the First Amendment. But when the underlying crime of theft, whether or not motivated by bias or prejudice, is already punishable by the state, then any additional punishment imposed because of biased motive is an unconstitutional penalty on thought. *See generally*, Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 358-79 (1991).

B. The Introduction Of Evidence of the Defendant's Speech And Association To Prove Why The Victim Was Selected Will Constrain the Exercise Of Free Speech And Association.

The way the penalty enhancer must be enforced chills the exercise of free speech and association and renders it unconstitutional. This is because, in practice, the likely means of proving selection of a victim because of race or religion, for example, will be the examination of the defendant's speech and association to demonstrate private beliefs in those subject areas. The statute requires

the government to "invade the sanctity of the individual's private social and political attitudes." *Redish* at 30.

The majority below correctly points out that speech uttered before or during commission of the crime may be introduced to show that the defendant held racist views and that those views motivated selection of the victim.[5]

The rules of evidence do not prohibit introduction of past speech and association or even post-crime speech and association to prove motive, *i.e.*, why the victim was selected. *See* F.R. Evid. 404(b), 801(d)(2); Wis. Stats. §§ 904.04(2) and 908.01(4)(b). Evidence of bias against a group might range from vulgar ethnic jokes to association in supremacy groups, from writings critical of affirmative action to membership in an anti-apartheid organization. *See also, supra*, p. 10.

While admitting this invasion into protected speech and association activities, the State simply disregards its First Amendment implications. *Mitchell*, 485 N.W.2d at 815; Br. of Pet. at 44. The State misunderstands the distinc-

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[5] The dissent incorrectly assumed that there is a "tight nexus" between selection of the victim and the underlying crime because circumstantial evidence would not be admissible to show victim selection.

> To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime.

Mitchell, 485 N.W.2d at 818-19 (Abrahamson, J., dissenting). This conclusion is curious in light of the State's admission that such speech could be used as circumstantial evidence to prove the defendant's selection of the victim. *Id.* at 815.

tion between using speech and association evidence as proof of the underlying crime and using it as proof of bias to support a finding that a victim was selected because of membership in a class.

Certainly speech can be used as evidence of a crime. "I hate that son of a bitch and I'm going to kill him" is admissible to prove that a defendant committed murder. "I hate that nigger and I'm going to kill him" is similarly admissible to prove that the defendant murdered an African-American. But using that same evidence, perhaps combined with evidence of membership in the KKK, to prove *and additionally punish* the same defendant's selection of that victim because of his race is to use speech and association to punish him only for his bigoted beliefs.

The practical result of § 939.645 is the punishment of the defendant's speech and associations, irrespective of the underlying crime. The statute sweeps protected speech and association into its ambit and punishes it. It is thus unconstitutionally broad.

One of the statute's many defects is its application to virtually every crime codified by the State of Wisconsin. Section 939.645 is not just an ethnic intimidation statute. It enhances penalties not only for violent crimes but also for crimes involving speech and assembly and economic and business activities. It takes little imagination to hypothesize the penalty enhancer's inhibiting effect on political speech and association when it covers such a range of criminal conduct.

Bosnian-Americans desiring to protest Serbian atrocities, for example, will be chilled from speaking or expressing their convictions knowing that a confrontation with Serbian-Americans could lead not only to a disorderly conduct charge (a Class B misdemeanor under Wis. Stat. § 947.01, 90 days) but also an enhanced penalty (up to one year) for their outrage.

A penalty enhancement very well could chill economic speech, particularly in large urban areas that feature

a variety of ethnic communities. For example, in a dispute between a minority community and landlords or retailers who overcharge or simply are rude the standoff might follow ethnic lines (*e.g.*, African-American v. Korean-American; hispanic v. white) as much as the economic lines reflecting the different economic status of the groups involved. What may start as the victimized neighborhood's threat to injure a business (a Class D felony under § 943.30, up to five years) or a threat to communicate derogatory information (a Class E felony under § 943.31, up to two years) could escalate to an ethnic or racial crime against the landlord or retailer "selected" "because of" his race or national origin.

Economic protest—through the threat of derogatory information or a boycott against price gouging—may be the economic minority's only effective response to mistreatment. Yet, such acts could be punished under § 939.645 as a hate crime evidenced by the utterance of an ethnic slur or a history of vitriolic neighbor squabbles. That prospect is not unlikely to chill the very essence of political and economic thought in a free society.

Further examples of chilling effects are apparent in the broad reach of the statute. Section 946.40, for example, makes it a crime to refuse to aid an officer. Section 939.645 enhances the penalty where an African-American's refusal is predicated on a belief that a police department is racist. Again, penalty enhancement would penalize such protest.

Most alarming is the application of the penalty enhancer to already criminalized "speech crimes." For example, it works to enhance the penalty for criminal defamation, Wis. Stats. § 947.01, and, as such, directly affects press freedom.[6]

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[6] The statute's application to libel renders it absolutely unconstitutional under the majority's viewpoint discrimination analysis in

The news media devote enormous energy to accuracy in reporting. Nothwithstanding those efforts, circumstances may expose some journalists to liability for criminal defamation. Their freedom to communicate ideas is limited not only by defamation law but, under § 939.645, by any underlying point of view. Section 939.645 will chill news coverage, editorials, scholarly publications, and activist literature and speech about protected persons or groups if journalists must fear being criminally charged as a bigot for publishing stories on race relations, ethnic strife, gay bashing, religious cultism, Nazism, or euthanasia, for example.

Based on the great potential for constraining public debate, this Court has struck down a law that told the news media what it had to publish. It also should strike down a statute that limits the media's freedom to publish or broadcast what they want.

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the . . . statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the . . . statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate . . . ."

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspaper could not be required to publish opposing views of political candidates).

Section 939.645 presents the possibility of an enhanced penalty for vigorous coverage of or editorializing about controversial or sensitive social or political issues. It presents the chilling possibility of a jury drawing an inference of bias from close scrutiny of prior news cover-

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R.A.V. *See supra* p. 10. Here, the State has exercised content discrimination by punishing some libels more than others. 112 S.Ct. at 2538.

age and editorials. This specter might well cause editors to "conclude that the safe course is to avoid controversy." *Id.*

The State gratuitously suggests that to prevent a chilling effect on speech: "do not commit a crime!" Br. of Pet. at 44. Even if this patronizing advice fits violent crime prevention, it ignores the law's broad applicability to many nonviolent crimes which, by definition, involve expressive conduct or speech entitled to the First Amendment's full protection.

III. PENALTY ENHANCERS ARE NOT NECESSARY TO ACHIEVE THE STATE'S GOAL OF ERADICATING HATE CRIMES.

Supporters of hate crimes laws are convinced that hate crimes are an especially invidious threat to society, particularly because of their *in terrorem* effect on the community. This elevated threat, they contend, offsets the need to apply the exacting scrutiny that the First Amendment ordinarily requires. Alternatively, they argue that even a statute that regulates expression can be saved if the resulting discrimination is narrowly tailored to serve compelling state interests.

As the *R.A.V.* court concluded, however, "the 'danger of censorship' presented by a facially content-based statute . . . requires that that weapon be employed only where it is '*necessary* to serve the asserted interest'." 112 S.Ct. at 2549 (emphasis in original) (citations omitted).

Beyond their constitutional defects, hate crimes laws are unnecessary and counterproductive to achieving the state's legitimate interest in eliminating hate crimes.[7]

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[7] It generally is for the legislative branch, not the judicial, to determine the wisdom of legislation. It is, therefore, beyond the scope of the Court's mission to ponder long on whether penalty enhancement is "good" public policy. Even those who believe such laws constitutional, however, find them contrary to good public policy.

> Enhancing punishment for racially motivated crimes seems to me to be part of a larger American syndrome of adopting harsh

Laws already exist that permit full and vigorous punishment of the conduct that intimidates and harms members of society, including members of protected groups, unprotected groups, minorities, and the majority who are reviled by minority groups.

While the First Amendment prohibits governmental sanction of bigoted thought, it does not make society defenseless against hate crimes. Government is able to punish underlying crime perpetrated by bigots—but without regard to their bigotry.

The criminal code provides "sufficient means" to prevent hate crimes without sacrificing the First Amendment. *R.A.V.*, 112 S.Ct. at 2550; *see also Texas v. Johnson*, 491 U.S. at 410 (need not punish flag desecration to keep the peace); *State v. Wyant*, 169 Ohio St. 3d 566, 579 597 N.E.2d 450, 459 (1992) ("Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime.")

Government can best demonstrate its commitment to fostering harmony, promoting the general welfare, and protecting intimidated and terrorized groups by punishing rather than ignoring already prohibited conduct perpetrated against those groups. Penalty enhancement statutes represent a poor strategy against the pernicious effects of hatred, intolerance, ignorance, and incivility. A better strategy—the one advanced by this Court—is to let "the competition of other ideas" help correct the "per-

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punishment as an expedient response that deals only with the most superficial manifestations of complex, deep-seated problems. Moreover, hate crime laws promise to be difficult to administer, may well be counterproductive in that they might be used disproportionately against the very minority groups they were primarily designed to protect, and to some limited extent may even deter protected speech.

James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?* 11 Crim. Just. Ethics 6, 17 (1992).

nicious" ones. *Gertz*, 418 U.S. at 339-40. Preventing the clash between First Amendment and social policy goals, this strategy leaves each of us free to think and believe what we will.

CONCLUSION

The Wisconsin Freedom of Information Council urges the Court to affirm the decision below invalidating Wis. Stats. § 939.645 (1989-90).

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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CONSITUTIONAL PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., Amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const., Amend. XIV.

CASES CITED

Barclay v. *Florida*, 463 U.S. 938 (1982) 3, 12, 13, 14

Beauharnais v. *Illinois*, 343 U.S. 250 (1952) 2, 7

Boos v. *Barry*, 485 U.S. 312 (1988) 22

California v. *Ramos*, 463 U.S. 992 (1983) 13

Collin v. *Smith*, 447 F.Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, *sub nom. Smith* v. *Collin*, 436 U.S. 953; *cert. denied sub nom. Smith* v. *Collin*, 439 U.S. 916 (1979) 23

Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 21

Dawson v. *Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992) 3, 11, 12, 13, 14

Gooding v. *Wilson*, 405 U.S. 515 (1972) 10, 11

In re Joshua H., Case No. H 008944 (Cal. 6th Dist. Court of Appeal) 11

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 16

People v. *Mearra S.*, Case No. A 055072 (Cal. First District Court of Appeal) 20

R.A.V. v. *City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ..... *passim*

Screws v. *United States*, 325 U.S. 91 (1945) 17, 18, 21

Stanley v. *Georgia*, 394 U.S. 557 (1969) 5

United States v. *Grayson*, 438 U.S. 41 (1978) 13, 14

United States v. *Guest*, 383 U.S. 745 (1966) 17

Watson v. *Fort Worth Bank and Trust*, 487 U.S. 977 (1988) 17

Williams v. *New York*, 337 U.S. 241 (1949) 13, 14

STATUTES AND RULES CITED

42 U.S.C. section 3604 16

California Penal Code section 422.7 6

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Wis. Stats. sections 111.321-.322 16

Wis. Criminal Code Section 939.645 ..... *passim*

OTHER AUTHORITIES

K. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U.Ill.L.Rev. 95, 126-27 ..... 19, 20

Note, *Bias Crimes: Unconscious Racism in the Prosecution of 'Racially Motivated Bias'*, 99 Yale L.J. 845, 851-55 (1990) 19

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of California Attorneys for Criminal Justice (CACJ). CACJ is the largest statewide organization of criminal defense attorneys in the United States, having approximately 2,700 dues paying members. The membership of CACJ is drawn from both the public and private criminal defense bars. Under the by-laws of CACJ, article IV, the organization exists to protect and ensure by rule of law those rights secured by the Constitutions of the United States and the State of California.

Like Wisconsin, California has its own set of "hate crime" offense enhancer statutes, which raise most of the same constitutional issues as Wisconsin Criminal Code Section 939.645. *See* note 1, *infra*. CACJ has consistently opposed these statutes, both on the ground that the statutes violate elementary principles of First Amendment jurisprudence, and on the ground that the statutes are so susceptible of selective application that they are inherently likely to become instruments directed at prosecuting, rather than protecting, the members of insular racial, ethnic, and religious groups.

The presentation of the views expressed in this brief is particularly important because in this case a national organization which styles itself as the guardian of civil liberties and constitutional freedoms has chosen, due to the avowed depth of its commitment to equal protection of the laws, to submit an *amicus curiae* brief urging reversal.

The ugliness of racially motivated "hate crime" is unquestioned. CACJ supports reasoned efforts, made within constitutional bounds, to reduce this evil. However, the aphorism that "hard cases make bad law" remains truer than ever. In approaching its task of

deciding the present case, the Court should bear in mind the admonition of Justice Robert Jackson in another notable "hate crime" case before the Court some 41 years ago:

> No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow. In these, as in other matters, our guiding spirit should be that each freedom is balanced with a responsibility, and every power of the State must be checked with safeguards.

Beauharnais v. *Illinois*, 343 U.S. 250, 304-05 (1952) (Jackson, J., dissenting).

In the interest of preserving vital constitutional safeguards, CACJ submits to the Court this brief of *amicus curiae*, in support of affirmance.

SUMMARY OF THE ARGUMENT

Wisconsin Criminal Code section 939.645 is an undisguised punishment of a content-based category of "bad thoughts." Even though the state clearly has the power to punish crimes committed as the result of "bad thoughts," the state may not set up a sentence enhancement scheme which discriminates among defendants who have committed the same criminal act, with the same criminal intent, based solely on the content of the defendants' thoughts. Such a distinction is not "necessary" to serve the state's admittedly compelling interest in seeking to prevent "hate crimes." Under *R.A.V.* v. *City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), Section 939.645 violates the First Amendment.

The argument that respondent Mitchell's conduct is "unprotected" by the First Amendment because it involved a violent crime is a misleading play on words. Although the term "unprotected" expression has sometimes been used by the Court, *R.A.V.*

recognized that the Court has never applied this concept to find any category of speech or expression wholly invisible to the First Amendment. While Wisconsin may properly punish Mitchell for his crime, it may not impose additional punishment upon him on the basis of the content of his thought and expression.

This case is unlike the Court's sentencing cases, such as *Dawson* v. *Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992), and *Barclay* v. *Florida*, 463 U.S. 938 (1982), which upheld the discretion of a sentencing judge to consider the defendant's pattern of beliefs and motivations, among a myriad of other factors, in selecting a sentence. *Dawson* and *Barclay* were predicated upon the virtually unlimited range of information which sentencing judges may consider in assessing the defendant's overall character. Such consideration in sentencing is altogether different from the application of a substantive criminal penalty which is based upon the content of thought and expression.

The First Amendment problem raised by Section 939.645 also differs markedly from anti-discrimination legislation. Such legislation, typically, is concerned with providing aid to the economic victims of discrimination, rather than with punishment. For this reason, actual proof of discriminatory intent is not required in order to establish a violation of such statutes. Such economic regulations are far more necessary, in relation to their underlying purposes, than are sentence enhancements for "hate crime." Content-neutral criminal statutes are available for punishing "hate crime," and there is no reason to conclude that such statutes are inadequate for achieving this purpose.

In this case, respondent Mitchell is himself a member of a racial minority. Anecdotal evidence indicates that this situation tends to be the rule rather than the exception. Members of disempowered groups are more likely than other persons to use language that can be interpreted, in hindsight, as evidence of group

"hate." Thus, in practice, statutes such as Section 939.645 are frequently used to prosecute, rather than "protect," members of disempowered groups.

The application of a statute such as Section 939.645 is open to virtually limitless prosecutorial discretion. Like other such "hate crime" statutes, Section 939.645 is arbitrary and fatally vague. It is inherently impossible to ascertain whether or not the motivation for a crime is truly the victim's group status as enumerated in the statute, or rather, some non-statutory attribute of the victim. The irrationality of this legislative classification, and the expression-related basis of the classification, render Section 939.645 invalid under the Due Process and Equal Protection clauses of the Constitution as well as the First Amendment.

ARGUMENT

I. A STATE CRIMINAL STATUTE SUCH AS WISCONSIN CRIMINAL CODE SECTION 939.645, WHICH PROVIDES AN INCREASED MAXIMUM SENTENCE FOR A CRIME IN WHICH THE VICTIM IS "INTENTIONALLY SELECTED" BECAUSE OF THE VICTIM'S RACE, RELIGION, COLOR, DISABILITY, SEXUAL ORIENTATION, OR ANCESTRY, VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION, IN THAT SUCH A STATUTE PUNISHES THOUGHT AND EXPRESSION.

In his majority opinion for the Court in *Stanley* v. *Georgia*, 394 U.S. 557, 565-66 (1969), the late Justice Thurgood Marshall wrote:

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desireability of controlling a person's private thoughts.

These eloquent words belie the fundamental position of Petitioner: That a criminal statute such as Wisconsin Criminal Code section 939.645, which was enacted for the manifest purpose of punishing thought, raises no concern under the First Amendment.

Section 939.645 is a content-based punishment of thought and the expression of thought which is not necessary to advance the state's interest in punishing crimes committed due to the perpetrator's perception that the victim belongs to a "hated" racial, religious, or other enumerated group. Like the St. Paul ordinance

considered by the Court last Term in *R.A.V.* v. *City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Section 939.645 violates the First Amendment.

A. The Wisconsin "Enhancer" Criminal Statute and Its Kindred Punish Expression Based on Content.

Petitioner and *amici curiae* argue strenuously that the Wisconsin Supreme Court erred in its conclusion that Wisconsin Criminal Code section 939.645 constitutes a direct punishment of thought. Although the wording of the Wisconsin statute may lend this argument cursory appeal, the statute's application in theory and in practice readily reveals that the Court below was correct.

Section 939.645, like its California kindred,[1] comes into play only after all elements of a substantive criminal offense are proved beyond a reasonable doubt. These elements include not only a defined physical act by the defendant — the *actus reus* — but also a defined criminal intent — the *mens rea*. Thus, Section 939.645 by definition punishes only those persons who both intended to commit the crime ***and*** who formed the intent to commit the crime because of their viewpoint concerning the victim's race, religion, color, disability, sexual orientation, or ancestry.

[1] *See, e. g.*, California Penal Code section 422.7, which provides:

> Except in the case of a person punished under Section 422.6, any crime which is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in the state prison or in a county jail not to exceed one year, by a fine not to exceed ten thousand dollars ($10,000), or by both that imprisonment and fine, if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, under any of the following circumstances, which shall be charged in the accusatory pleading:
>
> (a) The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.
>
> (b) The crime against property causes damage in excess of five hundred dollars ($500).

In making the perpetrator's ***viewpoint*** an essential element of the offense, Section 939.645 punishes protected expression. The argument to the contrary is, at bottom, an exercise in legal sophistry. In the words of Justice Black, "[n]o rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion." *Beauharnais* v. *Illinois*, 343 U.S. 250, 274 (1952) (Black, J., dissenting). The dominant purpose of Section 939.645 is to "chill" expressions that are founded upon the speaker's "hate" or other biases about personal attributes such as race, religion, color, disability, sexual orientation, or ancestry. Even though the overwhelming majority of Americans find expressions of group "hate" to be ugly and morally reprehensible, such expressions remain within the ambit of the First Amendment. As this Court observed last Term in *R.A.V.*, 112 S.Ct. at 2542 (citations omitted), "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."

B. Petitioner May Not Avoid the Invalidation of Section 939.645 Based on the Claim that the Defendant's Criminal Assault Is Not Protected by the First Amendment.

On behalf of Petitioner, *amici curiae* have argued that respondent Mitchell may not raise the issue of whether or not Section 939.645 violates the First Amendment on its face, because

> (c) The person charged with a crime under this section has been convicted previously of a violation of subdivision (a) or (b) of section 422.6, or has been convicted previously of a conspiracy to commit a crime described in subdivision (a) or (b) of Section 422.6.

California Penal Code section 422.75 provides:

> (a) Except in the case of a person punished under Section 422.7, a person who commits a felony or attempts to commit a felony because of the victim's race, color, religion, national country of origin, ancestry, or sexual orientation shall receive an additional term of one, two, or three years in state prison at the court's discretion.

Mitchell's violent actions, even if they included an expressive component, were not "protected" by the First Amendment. This argument has two basic fallacies. First, the postulated concept of "unprotected speech" is an oversimplified approach to the First Amendment problem, is not supported by this Court's decisions, and was expressly rejected last Term by this Court in *R.A.V.* Second, the Court has long recognized that the very existence of a criminal statute such as Section 939.645 chills expression by persons who are not before the Court, and may therefore be challenged successfully by a defendant prosecuted under that statute even though a more narrowly drawn statute would be permissible under the First Amendment as applied to the defendant's own conduct.

1. Criminal Acts, Though Punishable as Crimes, Retain First Amendment Protection for Their Components of Thought and Expression

The Court's discussion of the St. Paul, Minnesota ordinance involved in *R.A.V.* proceeded from the basic assumption that the ordinance punished only "fighting words" — a form of speech that is punishable, consistent with the First Amendment, because of its nonspeech elements. *R.A.V.*, 112 S.Ct. at 2543. The Court therefore addressed, at the beginning of its opinion, the concept of "unprotected speech" which *amici curiae* postulate to avoid First Amendment scrutiny here.

> We have sometimes said that [certain listed] categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as 'not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

112 S.Ct. at 2543 (citations omitted).

The present case involves no contention that defendant Todd Mitchell is "protected" against all criminal sanction based on his adjudicated viewpoint toward white persons. On the undisputed facts, he was properly convicted and punished with all due severity for the crime of felony aggravated battery, based on his participation in a nasty assault on Gregory Reddick. The issue to be considered by the Court is whether or not it is constitutionally permissible for the state to subject defendant Mitchell to a harshened criminal conviction and penalty, in comparison with any other similarly situated defendant, solely because of the jury's finding that defendant Mitchell "intentionally selected" Reddick as a crime victim because of Reddick's race, which is white.

As Petitioner tacitly concedes by omitting any such argument from its own brief, defendant Mitchell, even though he committed an act which is plainly punishable as a crime, has not forfeited any and all claim to First Amendment protection. As stated in *R.A.V.*, "[s]uch a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with [the Court's] jurisprudence as well." *R.A.V.*, 112 S.Ct. at 2543.

2. Section 939.645 Must Be Held Invalid as Overbroad Due to Its Chilling Effect on Expression, Even If It May Be Applied Lawfully as to Mitchell

In any prosecution under Section 939.645, the defendant's speech and expressive conduct constitutes the principal, if not the only, form of competent evidence. This must necessarily be the case, because there is simply no other way of divining the defendant's reason for "selecting" a particular crime victim. The "transcendent value to all society of constitutionally protected expression," *see Gooding* v. *Wilson*, 405 U.S. 515, 521-22 (1972), requires this Court to invalidate Section 939.645, even if a more narrowly drawn enhancement statute might constitutionally be applied to respondent Mitchell. Overbreadth scrutiny is required because of Section 939.645's actual and intended "chilling effect" on speech and expressive conduct by persons other than respondent.

In *Gooding* — a case in which this Court reviewed and invalidated as facially overbroad a Georgia statute which gave rise to a "hate speech" type prosecution — the Court explained its approach to legislation which "chills" protected expression as follows:

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may be regulated, suppressed, or punished is finely drawn, '[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.

> 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'

405 U.S. at 522 (citations omitted).

In the present situation, overbreadth analysis is particularly critical because of the strong likelihood that prosecutors, in seeking proof necessary for conviction under a statute such as Section 939.645, will draw upon evidence of statements made by a defendant long before the defendant formed an intent to commit a criminal act.[2] Petitioner's argument that "[a]buses are avoided when litigants are mindful of the proper relevancy limits on the admissibility of evidence, are mindful of the importance of protecting First Amendment activities, and when appellate courts provide the type of guidance this Court provided in *Dawson* [v. *Delaware*, *see infra*]," Petitioner's Brief at 12, is irreconcilable with the approach that this Court has consistently followed in respect to overbroad criminal statutes. *See*, *e. g.*, *Gooding*, *supra*; *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969) (in "hate speech" prosecution, invalidating as overbroad criminal syndicalism statute which "sweeps within its condemnation speech which our Constitution has immunized from governmental control").

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[2] As one example of a California prosecution which proceeded in this manner, the Court's attention is directed to the pending case of *In re Joshua H.*, Case No. H 008944 (Cal. 6th Dist. Court of Appeal). In that case, the Court in convicting the juvenile of a "sexual orientation" motivated assault under California's Penal Code § 422.7 (*see* note 1, *supra*) admitted, and found "determinative," statements made spontaneously by the minor to police officers after the minor's arrest on an unrelated matter some three years prior to the assault on trial. The minor allegedly told police officers that "he wanted to belong to an organization that was doing something about the niggers and faggots taking over the world." *In re Joshua H.*, *supra*, Reporter's Transcript on Appeal, at 400 (testimony), 612 (statement by trial court that evidence was "determinative.")

C. The Comparison to Cases in Which Personal Characteristics of the Defendant, Such as the Defendant's Religion, Association with Prison Gangs or Involvement in Declared Racial Wars, Have Been Held Permissible Factors to Consider in Sentencing, Is Inapposite Due to the Discretionary Nature of Sentencing

Petitioner relies heavily upon *Dawson* v. *Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992), and *Barclay* v. *Florida*, 463 U.S. 938 (1982), in support of an argument that the Court has already considered and approved the use of personal characteristics of a defendant, including the defendant's racist beliefs, in sentencing. Petitioner's Brief, at 15-17. These cases do not apply here, because they dealt with the scope of information that may be considered by a judge or other sentencing authority in the highly discretionary process of sentencing. Neither of these decisions addressed the use of the defendant's expression and thought as an element of a statutory criminal offense enhancer such as Section 939.645.

In *Dawson*, the issue before the Court was whether or not it was error to permit the jury to consider, solely for purposes of determining whether death or life imprisonment was the more appropriate sentence, a stipulation concerning the defendant's association with a prison gang called the Aryan Brotherhood. The Court stated, in *dictum*, that the consideration of such a fact in the sentencing process does not violate the First Amendment right of the defendant to freedom of association, even though the First Amendment protects an individual's rights to join groups. 112 S.Ct. at 1097. However, the Court held that the consideration of such a stipulation violated the First Amendment, where there was no showing that the defendant's particular association or abstract beliefs were relevant to the determination of whether or not the defendant represented a danger to society. *Id.*, at 1097-98.

The primary significance of *Dawson*, as acknowledged by the dissent of Justice Thomas, *see id.*, at 1103-04, lay in the recognition by this Court that First Amendment ***does*** afford protection to a convicted offender in the sentencing process, notwithstanding the heinous nature of the crime of which the defendant has been convicted. In light of the Court's prior decisions, such as *Williams* v. *New York*, 337 U.S. 241 (1949), *United States* v. *Grayson*, 438 U.S. 41 (1978), and *Barclay* v. *Florida*, 463 U.S. 939 (1983), which underscored the permissibility of a highly subjective, standardless approach to the selection of a discretionary sentence, the Court's imposition of ***any*** form of First Amendment limitation on sentencing phase evidence represented a major development in First Amendment jurisprudence.

In *Barclay*, the Court addressed only in passing the question of whether or not it was an error for the sentencing judge, when choosing between life imprisonment or death as the penalty to impose in a capital case, to consider as one of many factors the racial motivation for the defendant's act of murder. The Court held that for purposes of the discretionary sentencing process, the consideration of the defendant's intent to start a race war was "relevant to several statutory aggravating factors," and was, in particular, permissible to consider in determining whether the statutory aggravating factor of an "especially heinous, atrocious, or cruel" circumstance was present. 463 U.S. at 948-51.

The crucial difference between the issue presented in *Dawson* and *Barclay* and the issue presented in this case is that the Court is here concerned with review of a jury's determination that the defendant "falls within the legislatively defined category of persons" on whom a sentence enhancement may be imposed. *Compare Barclay*, 463 U.S. at 950, *quoting California* v. *Ramos*, 463 U.S. 992, 1008 (1983) (articulating this distinction).

The incidental consideration of a defendant's thought, expression, or speech as indications of the defendant's character during the discretionary sentencing process is fundamentally differ-

ent from the use of thought, expression, or speech to define a substantive criminal offense or a substantive enhancement. *See generally*, *Dawson*, *supra*, 112 S.Ct. at 1103-04 (Thomas, J., dissenting).

The task of assessing the defendant's character in order to select an appropriate sentence within a statutorily prescribed range, as discussed at length in *United States* v. *Grayson*, 438 U.S. 41, 51-53 (1978), is a "parlous" task which requires the sentencing authority to base its decision upon "predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation." This function requires a court to consider as much information as possible about the defendant, including many kinds of facts that would be wholly inadmissible in a criminal trial. As restated in *Dawson*, this Court's cases "emphasize that 'the sentencing authority has always been free to consider a wide range of relevant material.'" 112 S.Ct. at 1097.

Thus, in *Williams* v. *New York*, 337 U.S. 241, 250-51 & n.15 (1949), this Court held that sentencing judges could — and indeed should — properly seek information concerning every aspect of the defendant's life, including matters such as the defendant's "religion," in seeking to "guide their judgment toward a more enlightened and just sentence." Yet it would be absurd to argue, based on *Williams*, that a state does not violate the First Amendment if it enacts a statutory sentence enhancement that increases the punishment for all violent crime perpetrators who are atheists.

Similarly, it is an entirely different matter, which was in no way addressed in either *Dawson* or *Barclay*, for a state to establish a sentence enhancement that is founded on the content of the defendant's thought and expression. Eligibility for a statutory offense enhancement is not a matter of sentencing discretion. Such an enhancement must be evaluated, under the First Amendment, like any other legislative classification, in the manner most recently articulated in *R.A.V.*: Absent a showing that necessity to promote a compelling state interest, the defendant's thought and expression

may ***not*** serve as the basis for using "hate" motivation to convict a defendant of a distinct offense which is subject to an additional range of statutory punishment.

D. Section 939.645 Is Invalid Because It Is Not Necessary in Order to Promote a Compelling State Interest.

Like the St. Paul ordinance held to be invalid in *R.A.V.*, and for the identical reasons, Section 939.645 fails to survive this rigorous ends-means test.

1. Although the State Has a Compelling Interest in Punishing "Hate Crimes," Statutes Such as Section 939.645 Are Not Necessary to Advance That Interest.

Petitioner and *amici curiae* have devoted extensive arguments and appendices to proving the compelling nature of the State's interest in protecting the basic human rights of members of historically oppressed groups. The compelling nature of this interest was expressly acknowledged in *R.A.V.*, 112 S.Ct. at 2549, and is readily conceded here. However, the question that was held "dispositive" in *R.A.V.* was whether the highly suspect ***means*** of a classification based on the idea content of expression is "reasonably necessary" to achieve that compelling interest. *Id. R.A.V.* held that in view of the availability of other criminal statutes, such a classification is invalid under the First Amendment.

The reasoning which led the Court to hold invalid the ordinance involved in *R.A.V.*, despite the compelling nature of the State's interest, applies equally here. Simply put, the content-based classification must be shown to be necessary to advance the State's interest. Where the conduct to be punished is, by definition, already a criminal offense, this strict nexus requirement is difficult to satisfy. "The existence of adequate content-neutral alternatives . . . 'undercuts significantly' any defense of such a statute." *R.A.V.*,

112 S.Ct. at 2550. Neither Petitioner nor *amici curiae* have shown why Wisconsin's criminal statutes and penalties — either as now existing or as potentially amended by the state legislature — are so inherently weak or inadequate that they render the adoption of an additional, thought content-based enhancement statute "reasonably necessary."

2. The Comparison of Section 939.645 to Remedial Employment Discrimination Statutes Is Inappropriate, Because Employment Discrimination Statutes, Unlike a Criminal Offense Enhancer, Are Reasonably Necessary to Promote a Compelling State Interest.

Petitioner argues that the invalidation of Section 939.645 will open a Pandora's Box requiring the invalidation of other, longstanding statutes, such as statutes authorizing civil liability and sanctions for racial or religious discrimination in employment. Petitioner points to such remedial civil rights legislation, including Title VII of the Civil Rights Act, 42 U.S.C. sections 2000e-2(a)(1) (employment discrimination), 42 U.S.C. section 3604 (housing discrimination), and Wis. Stats. sections 111.321-.322 (employment discrimination), as examples of existing statutes which impose civil penalties based on an intent to interfere with civil rights. This attempted analogy is unpersuasive.

First, the Court must remain mindful that legislation prescribing civil liability for employment and housing discrimination based on factors such as race, sex, and religion is grounded upon governmental commerce power. *E. g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 301-04 (1964). Such legislation, in contradistinction to criminal offense "enhancers," is properly found to be ***necessary***, because there are no other available, content-neutral methods of advancing the state's compelling interest in eliminating discrimination in housing and employment.

In other words, although such anti-discrimination legislation arguably places an incidental burden on thought and expression, the strict ends-means nexus test that applies to a regulation of thought and expression is satisfied in the case of employment and housing discrimination statutes.

Second, a civil penalty or prohibition of discrimination in employment does not necessarily entail ***any*** regulation of protected speech or thought. Thus, for instance, it is established that an employer's civil liability for discrimination may be proved by a "disparate impact" type theory, based on the demonstrated ***effects*** of an employment practice that is ***not*** itself intentionally discriminatory, without any necessity of proof that the employer actually intended to discriminate. *E. g.*, *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). Where the actual focus of the legislative classification is an ***effect***, rather than a prohibition of subjective ***belief***, the classification is easier to reconcile with the First Amendment.

Third, a meaningful distinction may be drawn between the degree of "necessity" of statutes which are enacted to protect the affirmative exercise of constitutionally or statutorily protected rights by members of oppressed groups — *e. g.*, the "right to employment," the "right to use places of public accommodation," the "right to vote," the "right to associate," and the "right to travel" — and the degree of "necessity" of a statute such as Section 939.645 which merely adds additional "punishment" to the violation of a generalized right such as the "right to be free of unlawful assault."

Although this distinction was not articulated in cases such as *Screws* v. *United States*, 325 U.S. 91 (1945) and *United States* v. *Guest*, 383 U.S. 745 (1966), which demanded a "specific intent" requirement of federal criminal statutes punishing violations of civil rights in order to avoid the invalidation of these statutes on vagueness grounds, it does approach the core concern underlying these cases. Thus, the Court in *Screws* stated: "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not

necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." (325 U.S., at 108-09). It is almost too obvious to require mention that at the time *Screws* was decided, as now, the Fourteenth Amendment to the United States Constitution expressly guaranteed the right to life. Yet the *Screws* Court, in the above quoted passage, ***declined*** to hold that the specific intent requirement was satisfied by proof that the defendant "intended" to "violate" the victim's "right to life" because of his victim's race.

Although the wording of Wisconsin's Section 939.645 differs from the wording of the federal statute involved in *Screws*, the potential sweep of the two statutes is very similar. This point of similarity is well illustrated by the text of the California variation on the "hate crime" offense enhancer, quoted in note 1 *supra*. The same vagueness concerns addressed by the Court in *Screws* — which include concerns under the rubric of the Due Process Clause as well as the First Amendment — must be considered by the Court in deciding the present case.

II. PARTICULARLY IN LIGHT OF ITS BURDEN ON EXPRESSION, A STATUTE SUCH AS SECTION 939.645 VIOLATES THE DUE PROCESS CLAUSE AS WELL AS THE FIRST AMENDMENT, IN THAT IT IS UNDULY VAGUE AND IS INHERENTLY SUBJECT TO ARBITRARY, STANDARDLESS ENFORCEMENT

A. The Vagueness and Lack of Meaningful Standards for Enforcement Render "Hate Crime" Enhancement Statutes Uniquely Suited for Selective and Discriminatory Enforcement.

In this case a statute which is justified at length by Petitioner and *amici curiae* on the ground that it is necessary in order to protect members of minority groups from persecution on account of their group status has been used to ***punish*** a member of the

African-American minority racial group. This profound irony cannot escape the Court's notice. It is the position of *amicus curiae* California Attorneys for Criminal Justice that Section 939.645 and its kindred in other states are especially unsuited for their purported function, due to the probability of selective enforcement and prosecutorial biases, whether conscious or unconscious, which transform members of minority groups from the status of beneficiaries of the legislation to the status of its victims.

The more thoughtful commentators who have addressed the recent wave of "anti-hate crime" legislation have noted the likelihood that, in terms of achieving their purported objective, such legislation will do more harm than good. In Note, *Bias Crimes: Unconscious Racism in the Prosecution of 'Racially Motivated Bias'*, 99 Yale L.J. 845, 851-55 (1990), the author concludes that empirical evidence supports the hypothesis that the traditionally unreviewable discretion of prosecutors in determining what defendants are to be charged under a "hate crime" enhancer results in systematic, though unintentional, discrimination against African Americans and other members of minority racial groups. The Note proposes a model state statute that would limit or eliminate prosecutorial discretion.

In his 1990 article, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, Professor Kenneth L. Karst points out a more elemental flaw in the "legislative" approach to eliminating group bias. By their very nature, criminal statutes which purport to enforce a normative tone of civil, "civic" discourse on racial, sexual, or other group issues — a form of dialogue which Karst terms the speech of "Reason" — are inherently unsuited to aiding disempowered groups.

> To focus the constitutional freedom of expression on the speech of Reason, in the mode of civic deliberation, makes the freedom almost useless when cultures collide. Usually, it is outsiders who have to invoke the first amendment; the insiders who do the suppressing are sure to say that Reason has nothing to do

> with the case. In American history, the hand of the censor has always fallen disproportionately on speakers and writers who are members of racial or ethnic or religious minorities. What good is a constitutional protection centered on deliberative Reason for the outsiders whose messages are labeled Unreason and whose methods are not deliberative? The civic debate model's impoverished understanding not only clouds our view of the functions of freedom of expression but also threatens the liberating expression of subordinated groups.

K. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups,* 1990 U.Ill.L.Rev. 95, 126-27.

In connection with the pending case of *People* v. *Mearra S.*, Case No. A 055072 (Cal. First District Court of Appeal), which is an appeal of the conviction of an African American juvenile offender under California's "hate crime" offense enhancer statutes, *amicus curiae* conducted and submitted to the court an informal survey of approximately 21 public defender offices. This survey revealed that there was relatively little use of the hate crime enhancer laws in California. However, anecdotal information received from the public defender and defense counsel revealed that on the occasions in which the "hate crime" enhancer was charged, the fact pattern presented in this case, where a defendant of color is the person to whom the "hate crime" enhancer is applied, is the typical case rather than the exception.[3]

The ultimate decision concerning the wisdom of the approach to "hate crime" which is embodied in Section 939.645 and its kindred is, of course, for the Legislatures of the states rather than

[3] In San Francisco County, for example, the majority of cases prosecuted under California's hate crime statutes involved white victims. In some cases, they involved police officers. A sizeable number of those arrested and charged with the hate crimes were themselves from minority groups. In Sonoma County, of the cases reported, half of those prosecuted were Hispanic, the other half, white. In San Diego, forty percent of those prosecuted were black, sixty percent were white.

this Court. This obvious fact notwithstanding, *amici curiae* supporting petitioner have presented this Court with voluminous exhibits purporting to justify the "necessity" of "social legislation" such as Section 939.645. In evaluating these exhibits, the Court would do well to observe that, as a ***means*** of achieving the laudable ends of social reform that are urged by *amici curiae*, legislation such as Section 939.645 is so standardless, so arbitrary in its enforcement, and so vague in its compass of evidence of guilt, as to engender a substantial question as to its validity under the Due Process Clause. *See generally*, *Screws* v. *United States*, *supra*, 325 U.S. at 94-98 (plurality opinion of Douglas, J.).

B. Due to Its Vagueness, Arbitrariness, and Lack of Ascertainable Standards for Enforcement, Section 939.645 and Its Kindred Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Where criminal statutes trench upon the realm of thought and speech, this Court has been particularly careful to ensure that the legislation is neither vague nor overbroad. *E. g.*, *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961). In view of the burden which the statute places on expression, the lack of identifiable standards of guilt and resulting arbitrariness which are inherent in a statute such as Section 939.645 render such legislation invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Attorney Stewart Pollack, defending an alleged "hate crime" in Alameda County, described the nature of the case that he was defending in some detail. A store owner, Asian, and a black male were involved in a dispute, characterized in reports as "a matter of principle." The reports indicated that the accused stated that he "hated" the operators of the market, and would harass them until they left the neighborhood. Mr. Pollack indicated that the ongoing dialogue centered on the perceived treatment that black customers received in the store.

Deputy Public Defender Randy Danto, of the Santa Clara County Public Defender's Office, described a case involving two black defendants accused of two counts of attempted murder, with enhancements brought pursuant to California's hate crimes statutes. The victims were white and Hispanic.

Under close examination, almost every aggravated battery is revealed to be an ugly, morally repugnant act of "hate." How then should a prosecutor, acting under a statute such as Section 939.645, differentiate those hateful acts which are grounded in a proscribed form of "group bias" from acts which are grounded in "ordinary" forms of hate? Section 939.645 and its kindred provide no guidance. To cast the prosecutor's dilemma in the more concrete terms of the present case: How can she be certain that defendant Mitchell's "selection" of victim Reddick was truly based on Mitchell's perception of Reddick's race, as opposed to Mitchell's perception of Reddick as a wealthy person? The record before the prosecutor in this case, and no doubt in many others, could be squared with either hypothesis. Yet a hatred of Reddick for being "rich" is presumably a complete defense to the Section 939.645 charge. Thus, in the crucial sense that guilt or innocence is difficult if not impossible to know or ascertain in advance of prosecution, Section 939.645 is extremely vague.

By the same token, a prosecution under Section 939.645 places the defendant in the absurd position of having to "defend" his case by explaining to the jury that he "hated" his victim for a reason not proscribed by the statute. Thus Mitchell presumably could have won acquittal of the hate crime enhancer charge by introducing reasonable doubt as to whether he "hated" Reddick because he was white, or because he is rich enough to afford expensive sneakers. The legislative classification which gives rise to such a bizarre "defense" is a patently irrational criminal penalty scheme.

Particularly because the irrational distinction is grounded in the content of the defendant's thought and expression, Section 939.645 violates the Equal Protection Clause of the Fourteenth Amendment. *See Boos* v. *Barry*, 485 U.S. 312, 320-21 (1988).

CONCLUSION

In the so-called "Skokie" American Nazi case, District Judge Decker summed up the First Amendment's command with respect to "hate speech" in the following terms:

> When feelings and tensions are at their highest peak, it is a temptation to reach for one exception to the rule announced by Mr. Justice Holmes, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.'
>
> Freedom of thought carries with it the freedom to speak freely and to publicly assemble to express one's thoughts.
>
> The long list of cases reviewed in this opinion agrees that when a choice must be made, it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear.

Collin v. *Smith*, 447 F.Supp. 676, 702 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, *sub nom. Smith* v. *Collin*, 436 U.S. 953; *cert. denied sub nom. Smith* v. *Collin*, 439 U.S. 916 (1979).

Wisconsin Criminal Code Section 939.645 is truly an unnecessary, arbitrary enactment which is likely to do little to quell group tensions, but which, if not struck by this Court, is likely to do grave damage to the First Amendment.

Today, the issue before the Court is an enhanced punishment of crimes committed due to "group hate." If this statute is held to be permissible, the legislatures of the several states and the Congress of the United States may tomorrow enact enhanced punishments for crimes committed due to "opposition to abortion," or due to "opposition to United States foreign policy." The Court would open Pandora's box by preserving, not by striking down, Section 939.645.

For the reasons stated herein, the judgment below should be affirmed.

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No. 92-515

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE OHIO PUBLIC DEFENDER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT TODD MITCHELL

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INTEREST OF AMICUS CURIAE

Ohio law mandates that the Ohio Public Defender Commission "provide, supervise, and coordinate legal representation at state expense for indigent and other persons." Ohio Revised Code Section 120.01. The commission appoints the Ohio Public Defender, who, among other duties, provides legal representation to indigent defendants in criminal cases at the trial level and at all appellate levels. The Public Defender has an interest in seeing that the constitutional rights of all Ohioans are protected when they are charged with a violation of Ohio law. Foremost among these rights are those protected by the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

In 1991, the Ohio Public Defender undertook the representation of David Wyant, who had been convicted for a violation of Ohio Revised Code Section 2927.12, the state's ethnic intimidation law. As counsel for Mr. Wyant, the Public Defender argued in the Ohio Supreme Court that Mr. Wyant's conviction was voidable under the pertinent provisions of both the Ohio and United States Constitutions. On August 26, 1992, the Ohio Supreme Court rendered an opinion finding Ohio Revised Code Section 2927.12 unconstitutional under both constitutions.

Following that decision, the State of Ohio filed a petition for a writ of certiorari in this Court. *Ohio v. Wyant,* Case No. 92-568. As counsel for Mr. Wyant, the Public Defender filed a brief in opposition asking this Court to deny certiorari. The State's petition is still pending before this Court. There are significant differences between the Ohio ethnic intimidation statute and the Wisconsin statute at issue in the instant case, as well as important questions regarding this Court's jurisdiction to hear the *Wyant* case. Despite these crucial differences, David Wyant has a very real interest in the outcome of the instant case.

As advocates for people who have been or who may be charged with violations of the various ethnic intimidation and bias crime statutes, the Ohio Public Defender and the other public defenders who have subscribed to this amicus brief are also very interested in the outcome of this case. They are concerned that government may dictate what citizens may think by punishing the thoughts of criminal defendants.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

SUMMARY OF THE ARGUMENT

This case is about freedom of thought. Despite the protestations of the State of Wisconsin and its amici, this case is not concerned with Todd Mitchell's conduct. His conduct is sufficiently addressed by sections of the Wisconsin criminal code other than Wisconsin Statutes Section 939.645. It is Mr. Mitchell's thoughts, his motives, which the State deems offensive. But for the content and the viewpoint of his thoughts, Mr. Mitchell could not have received the harsh sentence imposed upon him. In *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), this Court fully addressed the issue raised in this case: the First Amendment forbids government from drawing distinctions between identical acts on the basis of the actor's viewpoint or the content of the actor's thoughts. The principles of *R.A.V.* apply to this case. The doctrine of stare decisis requires the consistent application of those principles. Just as the St. Paul ordinance in *R.A.V.* was facially unconstitutional, so is the Wisconsin statute at issue here.

Statutes such as Section 939.645 inevitably lead to selective enforcement and unequal treatment. Police officers, prosecutors, judges, and juries are forced to become "thought police" as they try to determine which offenses constitute bias crimes and which do not. Young members of historically disempowered groups are far more likely to be prosecuted under these statutes than are members of the majority. For this and other policy reasons, Section 939.645, though well intentioned, will prove to be extremely harmful to those persons it was designed to protect.

Wisconsin Statutes Section 939.645 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it treats persons differently based upon their exercise of First Amendment rights. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). The First

Amendment protects from governmental intrusion an individuals's right to think, believe, and disagree. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). In the criminal context, an offender's motive is the offender's thoughts, beliefs, and ideas. As the Wisconsin Supreme Court noted, an offender's motives are his reasons; they are the "because of" aspect of the underlying conduct. *State v. Mitchell*, 169 Wis. 2d 153, 164, 166, 485 N.W.2d 807, 812, 813 (1992). Through the use of Section 939.645, Wisconsin selectively punishes this thought aspect based on content and viewpoint, treating persons who act "because of" the victim's race or other designated characteristic more harshly than it does those who commit the identical underlying offense "because of" some other, state-approved motive.

ARGUMENT

I. THIS COURT'S DECISION IN R.A.V. v. CITY OF ST. PAUL, MINNESOTA HAS ALREADY DETERMINED THE FIRST AMENDMENT ISSUE PRESENTED BY THE STATE OF WISCONSIN.

This Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), is the starting point for any analysis of Section 939.645. In *R.A.V.*, this Court clarified that even in areas in which government may, consistently with the First Amendment, regulate or punish expression, it may not do so based upon the content or viewpoint of the expression. Thus, although certain categories of expression, such as "incitement to violence" (the category ostensibly at issue in the present case), may be punished, the punishment may not be based upon the government's hostility or favoritism toward the message expressed. *Id.* at 2545.

Not only does Section 939.645 impose additional punishments for an offender's motives (which in itself creates a thought crime), it does so only for motives with a particular content: the only motives punished are those involving "race, religion, color, disability, sexual orientation, national origin or ancestry." As this Court emphasized in *R.A.V.*, "the First Amendment does not permit government to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987)). Like the ordinance held unconstitutional in *R.A.V.*, Section 939.645 offends the First Amendment because of its selective punishment of "'bias-motivated' hatred and ... 'virulent notions of racial supremacy.'" 112 S. Ct. at 2548.

The *R.A.V.* analysis and result apply as much to the statute at issue in the instant case as they did to the St. Paul ordinance. When Section 939.645 is laid side by side with the *R.A.V.* decision, the outcome becomes clear: the Wisconsin statute is facially unconstitutional.

Application of the *R.A.V.* decision to this case is more than logical; it is mandated by the principle of stare decisis. This Court should adhere to the precedent it set in *R.A.V.* "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991). The doctrine of stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

In *Payne v. Tennessee,* this Court overruled its previous decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989). In so doing, the Court noted that those cases were decided by the narrowest of margins; there were spirited dissents in both cases which challenged the basic underpinnings of the decisions; both *Booth* and *Gathers* were questioned by members of the court in later decisions; and they defied consistent applications in the lower courts. *Payne v. Tennessee*, 111 S. Ct. at 2611. None of the flaws this Court found in *Booth* and *Gathers* exist in *R.A.V.* In that case, all nine Justices found that the St. Paul ordinance was unconstitutional. No members of this Court have questioned the *R.A.V.* decision in subsequent cases. The state supreme courts of Ohio and Wisconsin have applied *R.A.V.* in ruling their respective state bias crime statutes unconstitutional. *State v. Wyant,* 64 Ohio St. 3d 566, 597 N.E.2d 450, (1992); *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). In *State v. Plowman,* 314 Or. 157, 838 P.2d 558 (1992), the Oregon Supreme Court upheld the constitutionality of the Oregon bias crime statute. The Oregon Supreme Court found that in *R.A.V.*, this Court did not expressly rule on the constitutionality under the First Amendment of a statute similar to the Oregon law. *Plowman*, 314 Or. at 168, 838 P.2d at 565. The court distinguished the Oregon statute from those at issue in both *R.A.V.* and *Mitchell*, finding that the rationale supporting neither decision was applicable to *Plowman*. Under the stare decisis principles of *Payne v. Tennessee,* this Court's decision in *R.A.V.* applies to the instant case.

In a society governed by the rule of law, this Court must be faithful to its precedents. *Payne v. Tennessee*, 111 S. Ct. at 2621, (Marshall, J., dissenting). In his dissenting opinion in *Payne*, an opinion in which Justice Blackmun joined and upon which Justice Stevens commented with approval, Justice Marshall noted that the Supreme Court had never departed from its precedents without special justification. *Id.* at 2621. No justifications exist for a departure from *R.A.V.* in the present case. The issue in both cases is the same: punishment of selected thought, content, and viewpoint.

The State of Wisconsin contends that the harm caused by crimes including bias elements is qualitatively different from the harm caused by other crimes. However, that additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint. The same offensiveness, alarm, and sense of disempowerment is caused by bigoted speeches, books, and demonstrations, all of which are indisputedly protected by the First Amendment. Where the same message is communicated by illegal conduct, the message does not shield the conduct. The criminal act may be punished as always, but the offensive message itself does not lose its constitutional protection. Thus, one who burns a flag "by reason of" opposition to government policies may constitutionally be punished for a violation of a public burning law; but the government could not constitutionally upgrade the offense on the basis of the offender's motive for the offense or the message conveyed thereby, despite any additional harm or offensiveness it may create. In *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman,* 494 U.S. 1021 (1990), this Court explicitly acknowledged that flag burnings cause greater and more widespread harm than other unlawful burnings. However, this was only true when the flag was burned in a disrespectful manner. Therefore, this Court held that the statutes at issue impermissibly turned on the defendants' motives and viewpoint, and accordingly this Court struck down both statutes. The Wisconsin Supreme Court struck down Section 939.645 because it, too, is viewpoint-specific.

II. WISCONSIN STATUTES SECTION 939.645 INVITES DISCRIMINATORY ENFORCEMENT AGAINST MINORITIES.

Section 939.645 is an open invitation to arbitrary and discriminatory enforcement. In enacting this law, the Wisconsin legislature failed to establish minimal guidelines to govern law enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972). A law may not delegate basic policy matters to police officers, prosecutors, judges, and juries for resolution on an ad hoc and subjective basis. *Id.* at 108-09. When any underlying offense has been committed, the police officer at the scene must make a determination whether the offender acted "because of" the victim's race or other statutorily proscribed reason. In any given case, the offender's motive can be difficult, if not impossible, to detect. Offenders themselves may be unclear about their motives. Section 939.645 and other statutes of its ilk require law enforcement officers to become "thought police" in rooting out the reasons for an offender's conduct. Section 939.645 will pressure police officers encountering interethnic incidents into imputing bias motives where in fact there were none.

Todd Mitchell's motives, not his conduct or intent, are at issue in this case. As the Supreme Court of Wisconsin correctly found:

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

State v. Mitchell, 169 Wis. 2d 153, 164, 485 N.W.2d 807, 812 (1992).

Wisconsin's bias crime statute places impermissible burdens on police officers and prosecutors, forcing them to make highly subjective judgments which inevitably lead to selective enforcement. Statutes which target offensive beliefs create an "obvious invitation to discriminatory enforcement." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). A police officer who encounters an interracial confrontation would naturally be inclined to see that confrontation from the perspective of the combatant who shares the officer's ethnicity. Since most law enforcement officers are majority members, this law will necessarily lead to more arrests of and charges filed against minorities. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 361-62 (1991).

Any time one of the underlying offenses is committed, and the offender and the victim happen to be of different ethnicities, there will be the risk of even well-meaning officers and prosecutors adding a charge of ethnic intimidation as well. Where the actor is suspected of being a racist or an anti-Semite, a police officer could be more likely to investigate and arrest, and a prosecutor to pursue, questionable complaints of an underlying offense, because of the possibility of an additional charge of ethnic intimidation. Indeed, because of our societal consensus that bigots are ignorant, boorish, and even dangerous, it may well be that prosecutors would anticipate an easier time persuading a jury to convict on the more serious charge of ethnic intimidation than they would on the conduct-oriented underlying offense alone. When any of these situations would occur, it is foreseeable that the model statute would actually operate to inflame, rather than improve, ethnic relations.

Even those who support bias crime legislation recognize that the discretion to arrest and prosecute may be exercised on minimal and extremely subjective evidence. "Each particular situation has to be scrutinized by the investigating officers. ... There is a danger where somebody calls somebody a name, and the victim hollers, 'Hate crime!'" Jacob Sullum, *What's Hate Got to Do with It? Do Crimes of Bigotry Deserve Extra Punishment?* Reason, Dec. 1992, at 14, 16 (quoting Joe Roy, chief investigator for Klanwatch).

Ironically, abuse of this discretion is particularly invited in the case of minority community leaders and minority rights activists, whenever they inconvenience or criticize the government. Section 939.645 may have been conceived with the idea of helping minorities, but it is minorities who most of all need the First Amendment's protection of the freedom of opinion.

III. WISCONSIN STATUTES SECTION 939.645 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT IMPERMISSIBLY DISCRIMINATES AMONG PERSONS BASED UPON EXERCISE OF THEIR FUNDAMENTAL RIGHTS OF BELIEF AND EXPRESSION AND IS NOT PRECISELY TAILORED TO SERVE A COMPELLING STATE INTEREST.

A statute that treats persons differently based upon exercise of First Amendment rights is "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). A reviewing court must apply strict scrutiny to determine whether such a statute is "precisely tailored to serve a compelling

governmental interest." *Id.* Strict scrutiny of Section 939.645 reveals its constitutional flaws. The statute treats persons differently based upon their constitutionally protected thoughts and beliefs. Someone who commits any underlying offense because of some motive not singled out for condemnation may not be punished anywhere near as severely as may one who commits the same offense because of one of the statutorily enumerated biases. The factors which determine whether one defendant receives a shorter or a longer sentence than another defendant are the content and the viewpoint of the defendants' thoughts. This disparate treatment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The State of Wisconsin has no compelling governmental interest in the regulation of bigoted thoughts. Moreover, the State has no interest in differentiating among persons based upon those persons' thoughts and beliefs, no matter how offensive those thoughts and beliefs may be. This equal protection analysis is consistent with the First Amendment analysis. In fact, this Court has, on occasion, "fused" the two. See *R.A.V.* at 2544 n. 4. In *Carey v. Brown*, 447 U.S. 455 (1980), this Court quoted its earlier findings in *Police Department v. Mosley*, 408 U.S. 92 (1972), "... Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 447 U.S. at 462-63(citation omitted). The Court quoted further, " '...under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views ... [G]overnment must afford all points of view an equal opportunity to be heard.' " *Id.* at 463.

The Equal Protection Clause prohibits disparate treatment of similarly situated individuals based upon their thoughts, ideas, or viewpoints. Wisconsin could not treat similarly situated authors differently based on the content of their work, nor similarly situated parade permit applicants differently based on their viewpoint and the anticipated response of others. *Forsyth County, Georgia v. Nationalist Movement,* 112 S. Ct. 2395 (1992). Likewise, the Equal Protection Clause forbids Wisconsin from treating similarly situated offenders differently based upon their viewpoints or the anticipated response of others. The focus on content and viewpoint as the basis of the disparate treatment offends the equal protection principles in the same manner irrespective of the individual's activity. Just as Section 939.645 fails the strict scrutiny analysis under the First Amendment, it also fails under the Equal Protection Clause.

Intolerance of differences among people is deplorable in private citizens. It is unconstitutional in government. Just as individuals may not commit crimes based on their intolerance of those who differ from them, government cannot act on its intolerance of people with certain beliefs, even bigoted beliefs. Thus, laws like Section 939.645 are as unjust as the acts they are designed to prevent, and for the same reasons. "By punishing opinions, hate-crime laws institutionalize the very bigotry they seek to prevent: They treat some individuals as second-class citizens simply because of the ideas they hold." Sullum, *supra*, at 18. Wisconsin may constitutionally espouse the view that bigotry is wrong and destructive, and brotherhood is good, in the same way it may espouse the view that communism is bad and destructive, and patriotism is good. But just as it may not punish disagreement about communism by enhancing penalties for offenses motivated by communism, Wisconsin may not punish disagreement about bigotry by enhancing penalties for offenses motivated by bigotry.

CONCLUSION

This case does not present this Court with the unappealing task of choosing between the interests of equality and those of civil liberties. Neither Respondent nor his amici are asking this Court to abandon its longstanding tradition of protecting Americans from the evils of invidious discrimination. But this case is not about discrimination, it is about the constitutionally protected thoughts of a man who committed a criminal offense.

The State concedes that it cannot punish Todd Mitchell for his bigotry alone, Brf. Pet. at 13, and his criminal conduct is already punishable under other Wisconsin laws. Had the State chosen to punish Todd Mitchell for his conduct alone, this case would not be before this Court. But the State has chosen to punish him for his thoughts as well. Mr. Mitchell's thoughts cannot protect him from punishment for his illegal conduct. However, his conduct cannot enable the State to subject him to additional punishment for those thoughts.

A decision in favor of Todd Mitchell would not be a defeat for equality. It would be an affirmation of that valued ideal. The very concept of equality is a product of the free minds of men and women. The progress we have made toward equality has been made possible by freedom of thought. This Court can continue that progress and, at the same time, protect fundamental First Amendment rights by affirming the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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MAR 1 1993

NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE OF WISCONSIN INTER-RACIAL AND INTER-FAITH COALITION FOR FREEDOM OF THOUGHT IN SUPPORT OF RESPONDENT

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Smith v. State of California, 361 U.S. 147
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Texas Department of Community Affairs
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United States v. Harriss, 347 U.S. 612,
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United States v. Locke, 471 U.S. 84
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Village of Hoffman Estates v. Flipside,
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Washington v. Davis, 426 U.S. 229,
96 S.Ct. 2040 (1976) 7

OTHER AUTHORITIES

Black Victims, Special Report, Bureau
of Justice Statistics, U. S.
Dept. of Justice, April, 1990 27
Black's Law Dictionary, (6th Ed. 1990)
Page 25 19
Page 373 6
Page 810 6
Page 935 6
Changing Nature of Employment Discrimination
Litigation, Donahue and Siegelman,
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Hate Crimes Statistics Act of 1988, ... 16
La Fave, Scott, Criminal Law, 2nd Ed. 1986
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§3.5 (e) 20
Model Penal Code, §1.13(2) 19
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Press Release, (initial findings report
January, 1993) Federal Bureau of
Investigation, U. S. Dept. of Justice 16
Prosser & Keeton on Torts, (5th Ed. 1984)
§8 6
§41 21
Restatement (Second) Torts, §8A cmt a (1965) 6
§2 19
Training Guide for Hate Crime Data Collection,
United States Dept. of Justice FBI 1991 25

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18 U.S.C. §241 9
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INTEREST OF AMICUS CURIAE

This brief* is submitted on behalf of the Wisconsin Inter-Racial and Inter-Faith Coalition for Freedom of Thought.

The Coalition consists of Wisconsin citizens - civil rights attorneys, legislators, former legislators, clergy, social workers and educators - who have a longstanding involvement in public affairs and who are convinced that the Wisconsin Hate Crimes Statute is not the correct approach to solving the acknowledged problem of bias crimes. The interest of the Coalition is in content-neutral approaches, which we will describe.

*Kim Ian Moermond, a student at Harvard Law School, assisted in the preparation of this brief.

SUMMARY OF OUR POSITION

Crimes of hatred are especially repulsive to a nation committed to the integration of its many different peoples. There is no question that we, our society, our states, and the Federal government oppose such crimes. There is also no question that we should oppose them more vigorously. We are also a nation which values freedom of speech, thought, and association to an extent unknown in any other country now or before. One way this is expressed is through the constitutional guarantees which require clearly defined laws and firmly established procedural protections in the execution of those laws. The objective here is to find the best way to combat "hate crimes" without compromising or jeopardizing any of the other principles we hold dear. Wisconsin's hate crimes penalty enhancer, although well-intentioned, is not the right way.

In opposing the penalty enhancer approach we are not suggesting that the Court turn a deaf ear to the acknowledged problem of hate crimes. Nor do we accept inaction in the face of a problem we see only with profound sorrow. Since we deeply share the State's concern over crimes of hatred, we feel it our obligation to suggest ways in which a constitutionally acceptable response to hate crimes might be fashioned. There are effective ways to target crimes of this type without cutting into First Amendment values or compromising criminal procedure protections. We will suggest augmenting aggravating factors in *sentencing* and also a separate statute targeting crimes of *terror*. Only these two options, we believe, can steer a clear path between the "pre-conviction" First Amendment concerns of *R.A.V.*, on the one hand, and the post-conviction First Amendment concerns of *Dawson*, on the other.

To the extent that the Wisconsin statute is seen by all as a "test" or guideline-setting case for similar statutes across the country, we would ask the Court to consider the many problems we have found in the *structure* and *operation* of the Wisconsin statute. A good deal has been rightfully said about hate crimes, but much of this discussion has left the actual statutes far behind.

The closer one examines the Wisconsin enhancer, the more one notices the difficulties in interpretation, the ambiguities about its implementation, and the basic flaws in its structure and design. These problems have relevance beyond Wisconsin. It was, in fact, the wide discrepancy in explanations about how these laws would work and what their scope would or should be, which finally prompted us to write. We, too, want to punish these crimes more severely, but we are unwilling to unnecessarily compromise our legal protections to do so. There are feasible and effective alternatives. We are still at a point in the process of making and applying these types of laws that we may yet design a constitutionally acceptable mouse trap. The Court must ensure that this is done without either compromising *R.A.V.* or diluting *Dawson*. We offer our analysis in the hopes that it may be of some assistance.

SUMMARY OF THE ARGUMENT

The issues for the Court in *State v. Mitchell* are best framed by first identifying what this case is not about. The question for the Court is not whether the motivations of a criminal may be considered by the court in *sentencing*; nor whether consideration of motive in sentencing can result in a lengthier sentence. The question is not even whether or not the State may link motivational factors to an element within another offense; such as the Federal and state laws punishing intentional interferences with the exercise of civil rights (although we would counsel that these laws are and should remain keyed to the *actus reus* interference referent). No, the question for the Court is: Is the State permitted to punish motive *directly* as the *principal element* of a *separate criminal charge* in the *guilt-phase* of a criminal trial on a *non-neutral content basis*. This is the question of *State v. Mitchell*.

We have no doubt that legislative *power* includes the ability to punish these crimes more severely than others. However, the scope of legislative power remains a function of *how* the state seeks to implement its measures. *One way or*

another these people *will* be punished more severely. But this does not mean that *any* way is permissible. This statute is the wrong approach. By seeking to punish bad motives directly as a separate offense in the guilt-phase of a trial, the enhancer jeopardizes crucial Constitutional principles thrice. Not only does the enhancer infringe *directly* upon First Amendment protections, but it infringes a *second* time *and* violates due process because it exacts punishment without any clearly specifiable scienter requirement. Allowing this combination of First Amendment and due process violations would set dangerous precedents in our administration of criminal justice. Thus, one need not suggest that there is *expression* in these activities to resist vague and overbroad statutes. The cure of diluting basic scienter requirements will undoubtedly come back to plague us with new diseases. And whatever does eventually happen with how sentencing is handled in this country, our legal system will not be well served by purposely blurring the lines between the guilt and sentencing phases of a trial.

We will focus on the structural underpinnings of the First Amendment and due process problems which render the enhancer incurably vague and overbroad. These are highlighted by, and often only further aggravated by, the State's attempts to dodge or define away the First Amendment limitations. The "ball" to keep an eye on is: what is the enhancer and how does it handle motive? The answers given to these questions have been alarmingly vague and inconsistent. These are threshold problems. Without first solving these underlying flaws, the State need not worry whether it *would* fall within *O'Brien* or stricter tests. It does not reach that stage. These problems doom the Wisconsin statute, but identifying their sources and contours will help us frame alternatives.

ANTI-DISCRIMINATION LAWS DISTINGUISHED

The enhancer can and must be distinguished from both civil anti-discrimination laws and the criminal provisions of Federal civil rights laws. Neither set of laws supports the

wholesale and boundless expansion of "liability" which would accompany laws like Wisconsin's enhancer. Equally important, these laws can and must be distinguished from one another. The civil rights statutes are specific intent criminal provisions, while the civil anti-discrimination laws employ tort-based causation and liability standards. Our problem with the enhancer is that it straddles this divide, speaking in terms of tort-liability, but inflicting criminal punishments. The enhancer would impose tort-liabilities without the corresponding duty context, and would exact criminal penalties without the necessary scienter requirement. Civil anti-discrimination legal standards must not be imported into criminal law this way. When the Federal provisions are properly analyzed, they will suggest and support our approach instead of the enhancer.

Our inquiry should begin by responding to the now oft-quoted question posed by Justice Bablitch in his dissent in the Wisconsin Supreme Court. Justice Bablitch asked:

> "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an *illegal act* and not protect discrimination in the performance of an *otherwise legal act*?"(P.A. 54)(emphasis supplied)

But this is precisely the point! In comparing anti-discrimination laws to the enhancer, Justice Bablitch said, "[b]oth sets of laws involve discrimination, both involve victims, both involve action 'because of' the victim's status."(P.A. 54) *However*, they do not both include a predicate, or underlying offense. The whole point of the anti-discrimination laws was to create an offense where none existed before. The "*otherwise legal act*" Justice Bablitch refers to, would be the ability to refuse to hire someone "because of" that person's race, etc. This, of course, would be "*otherwise legal*" without the anti-discrimination laws. By contrast, the enhancer seeks to create a second offense on top of the first. The only extra "element" between the two charges which the

enhancer can punish is motive.

Understanding the genesis and the nature of the new offense created by anti-discrimination law, not only goes to answering Justice Bablitch's question, but to exposing why he is mistaken in attempting to transport tort-based liability into the criminal context. As with all tort-based liabilities, anti-discrimination laws are premised on a *duty* with respect to a given activity. Absent that duty, there can be no liability for the act. In anti-discrimination laws this duty is either imposed on the government itself, or transferred into some distinctly structured activity, typically a vital social-infrastructural function, such as employment and housing.

The State suggests that since the government can punish "discriminatory acts" in other contexts then it must be able to do so here. The logic, it would appear, is "in for a penny in for a pound." Aside from the fact that the premise itself requires serious qualification, the enhancer would bring a limitless expansion of the concept. The enhancer would reach into all private activities; in all contexts, and once the precedent were set allowing the State to punish bad motive directly as an element of a separate offense in a criminal trial, there would be nothing to prevent the next intrusion. The question of whether the legislature has the *power* to construct and impose such a duty cannot be answered independently of the *execution* of that power, i.e., *how* it would do this. It is this issue we address.

THE DANGER OF MIXING TORT & CRIMINAL LAW

The most crucial distinction concerns the difference in the liability and causality standards. The proponents of the enhancer have glided back and forth across the spectrum of our laws alighting wherever and whenever anything approaching the term *discriminatory intent* or the word *motive* appears. The assembled legalisms are then jumbled together with the purpose of *proving* that the enhancer, too, may punish discriminatory *intent* or *motive* because this is done in *x*, *y* or *z* contexts. But the question here remains: Is the State permitted to punish bad

motives directly as an element in a separate criminal offense during the guilt-phase of a trial, on a non-neutral content basis. *No* case has been submitted as precedence for that proposition.[1]

Legal terms are only useful when they are used consistently. When removed from context they not only cause confusion, but they may likely do damage in the new context. So it has been with the enhancer's effort to transport tort-based concepts and standards into the criminal context. The term *intent* is used in both tort and criminal law, but it does not mean the same thing in both.[2] In criminal law, the concept is both precise and constant. In tort, the term refers to liability with respect to causation. Unlike its criminal cousin, intent in tort is often used for, and substituted by, the term *motive*, especially so in the anti-discrimination context. Does one need any further reasons to be extra cautious about attempts, especially if *intentional*, to mix criminal and tort concepts together?

The disparity in meanings becomes even more pronounced when one adds the word *discriminatory* to *intent* and then builds a very unique procedural and jurisprudential framework around the new term.[3] In addition to a meaning, the term(s) now has a *function* -one quite alien to intent in criminal law. The so-called

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[1] The closest anyone has claimed to come to proving that motive can be punished directly as an element was the *Brief of Amici Curlae States*, at p. 24. They actually cited *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035 (1945), which makes exactly the opposite point.

[2] *Definitions: Black's Law Dictionary* (6th ed. 1990), Mens Rea, at 985, Criminal Intent, at 373, Intent at 810; *Model Penal Code* § 202; *Restatement (Second) Torts* § 8A, cmt a (1965), "'Intent,... has reference to the consequences of an act rather than the act itself."; *See also*, W. Page Keeton et al., *Prosser & Keeton on Torts*, § 8,(5th ed. 1984);

[3] *See*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989).

intent requirement[4] serves less as a distinct element than a residual liability threshold within a larger procedural burden-shifting framework, albeit still phrased in substantive form. The substance and function of the term is also influenced by the scope and contours of the overarching legal duty imposed in this field.[5] Indeed, it is hard to conceive of the *intent requirement* fully apart from that context. By the time we have travelled through the burden-shifting matrix of *McDonnell Douglas* and *Burdine* through to *Price Waterhouse* we can expose legal liability, but this is hardly *intent* as its known in the criminal context. It makes little sense to speak of partial intent or mixed-motive or "but for" or substantial factor *intent* in criminal law. Likewise, the fact that *intent* and *motive* may be used interchangeably in anti-discrimination contexts only further highlights the distance from criminal *intent*. Thus, it cannot be said that someone who acts with *discriminatory intent* in a Title VII context would therefore have satisfied a *discriminatory intent* element were one required in a criminal statute. Were there ever such a transitive quality to the term, it has surely been lost in the process. Yet, precisely such a mixing of tort and criminal constructions is found in numerous statements and examples given by proponents of the enhancer.[6] An example of this transitive reasoning is

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[4] *Intent* in employment discrimination has also been called or *discriminatory intent*, *discriminatory purpose discriminatory motive deliberately discriminatory motive*, *deliberately intentional discrimination*, *discriminatory animus*, *intentional discrimination*; *intentional discriminatory motive or purpose*, and/or just *intent* and/or *motive*.

[5] *See*, *Washington v. Davis*, 426 U.S. 229, 244, 247-248, 96 S.Ct. 2040, 2050-2051 (1976). Constitutional versus statutory requirements.

[6] The argument runs either of two paths: (1) discriminatory intent may be punished in Title VII = discriminatory intent = discriminatory motive = motive = *Dawson* = *Dawson* plus a stretch = State may punish motive directly; or, (2) "discriminatory acts" may be punished in Title VII = discriminatory acts are intentional = intentional selection + plus racial motive = discriminatory motive = discriminatory intent = discriminatory act = intentional acts are punishable directly in criminal proceedings.

illustrated in the following excerpt from the State's Brief. We have underlined and numbered all those terms or phrases which are misleading by having succumbed to the unqualified mixing of tort and criminal terminology.

> "**(1)** Discriminatory motive plays exactly the same role in both the enhancer and other anti-discrimination laws. In both cases, the **(2)** presence of discriminatory motive *alone* **(3)** affects the sanction imposed on conduct. In the penalty enhancer context, the existence of a discriminatory motive is the difference between a **(4)** higher or a lower maximum penalty. Under other anti-discrimination laws, the existence of a **(5)** discriminatory motive is the difference between liability and no liability at all.(Pet. 31)

Statement (1) we have just shown is untrue; as is (2). Phrases (3) and (4) are euphemisms for "a *separate criminal charge* heard directly in the *guilt-phase* of the trial exacting its *own* penalties." The word "conduct" in (3) refers to what Justice Bablitch calls the *"act of selection,"* as opposed to the *reason* or *motive* for the choice (below). Statements (5) and (1) will become of interest below when the State later denies that the enhancer targets motive. Clearly, the State has imbibed a mixture of tort and criminal concepts while attempting to operate the enhancer.

Next, *discriminatory intent* or *motive* in discrimination law does not actually *prove* bigotry or truly bad motive. It only means that a person charged with a duty has improperly treated another person differently because of race, etc., *regardless* of what motivations actually drove the person to do so.[7]

A final crucial reason to resist direct and unqualified importation of standards developed in Title VII cases into criminal law is recognition of the fundamental difference between a Title VII hearing and a criminal jury trial. It would be unwise to weave these civil standards into the criminal context,

[7] If bad motive were the target, then why may tenants discriminate against landlords, e.g., refuse to rent from a landlord because of that landlord's race, perhaps even with the intent of bankrupting him or her? The asymmetry results from the nature and limits of the duty imposed.

especially at a point when the employment discrimination process may become even more administrative in form.[8]

CRIMINAL STATUTES DISTINGUISHED

The criminal provisions of the civil rights laws include, 18 U.S.C. §§ 241, 242, 245; 42 U.S.C. §§ 1985; 42 U.S.C. 3631. Because they provide for criminal sanctions, they are seen as the strongest *potential* precedent the State could claim. The enhancer, however, differs fundamentally from these statutes. As with the civil anti-discrimination laws, these few criminal provisions have a specific and limited context. In general, each of these statutes reflects a governmentally created or guaranteed rights context. Like their civil counterparts, they created offenses where none existed before, or rather where other applicable laws were unenforced or were not directly protective. They shape their protections around primary citizen rights with regard to participation in public activities, using public services and facilities, and exercising basic citizenship rights.[9]

The Federal provisions require specific intent to prevent another from exercising protected rights and privileges.[10] The precise wording varies, but the typical prohibition is to willfully injure, intimidate, or interfere (§ 241, § 245, § 3631) by force or threat of force (§ 245, § 3631) with the exercise of specified

[8] *See*, John J. Donohue III & Peter Siegelman, Peter; *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991). The contrast with the NLRB hearings is even more striking.

[9] Note, 18 U.S.C. § 242 also applies to aliens. 42 U.S.C. § 3631 covers fair housing, likewise a societal-infrastructural necessity. 42 U.S.C. § 1985(3) prohibits conspiracies to interfere with civil rights. In this sense, all these form part of a continuum of statutes (both civil and criminal) aimed at protecting general public activity and participation, and preventing disruptions and deprivations in those areas. *See also*, § 1981 (contracts); § 1982 (property); § 1983 (state action).

[10] *See*, *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945); *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170 (1966).

rights. §§ 245 and 3631 include the intent to interfere "on account of" the race, etc. of the affected person(s) The Federal provisions are thus not generalized tort laws. They are not even generalized anti-discrimination laws. There is no violation for interfering with just *any* activity; nor if one discriminates outside the context of public right or activity. Nor do the Federal statutes ask *why* one interfered in protected activities, only whether one formed the requisite specific intent to do so. Bad motive is neither required nor sufficient[11] The State cites *Bray v. Alexandria Women's Health Clinic*,(Pet. 30 n. 3), which under § 1985(3) requires *animus*, to suggest that the State may likewise target *animus*.[12] This, however, neglects the context and *actus reus* referents of those distinct offenses. Neither 1985(3) in *Bray* nor the other provisions would allow punishing *animus* independently of the intentional interference, etc. Finally, the notion of an underlying crime is essentially irrelevant; the Federal provisions require no predicate offense, only intentional interference. Where force and/or conspiracy are required, they are then constituent elements. The *actus reus* is interfering.

As such, these crimes provide a model for an *anti-terror* statute, not the enhancer. Even were the enhancer to assume civil rights law format, the difference would still be as between one statute which prohibited interference with *any* protected right for *any* reason versus the enhancer version which would increase penalties only for interferences done by reason of bias. Without the *actus reus* referent and the specific intent as to that offense, and unable to re-punish the intent subsumed in the underlying crime, the enhancer has only the *why*, the *reason*, the *motive* left to punish. Even if recast into a lesser-included-offense

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[11] *Screws*, at 106-107, 1038.

[12] 61 U.S.L.W. 4080 (U.S. January 13, 1993 (§1985(3) also requires conspiracy); *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790 (1971) introduced the animus requirement so as not to create an open-ended federal tort law. To this extent, the animus requirement cannot be read independently from the requirement to define the class.

framework, the "extra element" between the enhancer crime and the underlying crime is still motive. This is beyond what the Federal provisions can condone. First, by targeting motive directly, and also selectively, the enhancer punishes by content. Second, it was the referent offense and specific intent requirement as to that offense which kept the Federal statutes constitutional in the first place.[13] Without a referent, the enhancer has only a subjective and indeterminate motivational "element." It can specify no scienter requirement. Third, these problems are aggravated, and the risk of chilling increased, because the enhancer is not merely more *expansive* than either the anti-discrimination laws or the civil rights provisions, but it is also far more *intrusive*, extending to all private activities, in all contexts.

Finally, this lack of referent also largely explains the difference in admissibility results. The difference is between the multiple element federal offense situation where evidence may be relevant for any number of purposes, versus bringing in the evidence to prove a single *content-based* "element" of motive. Instead, even these typically bizarre cases still reaffirm the intent requirement.[14]

WHAT IS THE ENHANCER?

WHAT IS THE ENHANCER? This is the critical question before the Court today. Curiously, however, the uncertainty about this fundamental question has been missed by many observers. Petitioner's Amici, for instance, seem to be speaking more about their *own* notions of what an enhancer is or *should* be than about this statute. However, as concerns the

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[13] *See, Guest*; *Screws*; and *Smith v. State of California*, 361 U.S. 147, 150, 80 S.Ct. 217 (1959) "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

[14] *See, United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992).

specific statute before the Court, the simple question of "*what the enhancer is*?" has still not yet been clearly answered by the State.

The Wisconsin Supreme Court invalidated the statute because it found it incurably vague and overbroad. The State criticizes this holding, but the State has itself continued to vary its interpretation of the enhancer and has juggled quite contradictory explanations in the several briefs submitted en route to this Court. Although both the State and the two dissenting Justices believe the statute is clear, they have offered quite different and divergent interpretations as to what the enhancer is and how it operates. Nor are these differences merely variations on a theme. While it is not unusual for dissenting Justices to offer interpretations differing from the State's, it is significant here because these were to have provided a limiting construction. The mere fact that all these interpretations differ, and that the State's position itself shifts, exemplifies vagueness.[15] Enhancers may be "strange beasts," but they cannot be shape-shifters if they wish to survive overbreadth and vagueness challenges.

We now review the various interpretations offered by the State, the dissenters, and selected Amici to see what they believe the enhancer is, and how they believe the enhancer handles motive.

The State's *current* position is tied to its erroneous reading of *Dawson*. Since *Dawson* and other *sentencing* cases teach that speech and associational evidence as to character and motive may be considered in setting sentence, the State now attempts to paint the enhancer as merely another sentencing tool. This position, however, is built on two misconceptions. First, the enhancer is not merely another sentencing tool, but rather operates during the guilt-phase of the trial and yields a separate conviction. Second, this position dangerously stretches and

[15] *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299 (1972). A vague prohibition has three basic dangers, including, failure to give adequate notice of what is prohibited, danger of standardless enforcement, and chilling of First Amendment freedoms.

distorts not only the holding of *Dawson*, but its purpose.[16] The State is suggesting that since *Dawson* says that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing," it may therefore punish motivations directly by making them an element of a substantive criminal offense.(Pet. 8)

This mischaracterization of the enhancer as a mere sentencing tool is picked up in the Amici Briefs. The result is a flood of comments on *sentencing*; *Dawson* is invoked repeatedly. Yet even the Amici, despite apparent certainty on this point, are not without some confusion and contradictions. For instance, the *Brief of the National Conference of State Legislatures, et al.*, explains that the Wisconsin enhancer statute merely addresses "a relevant sentencing consideration." (p. 4) It explains that, "[t]he penalty enhancer is in form a law of sentencing..."(p. 13) *However*, only four pages later they explain with equal assuredness that the Wisconsin statute, "*in effect, creates a scheme of greater and lesser included offenses*."(p. 17, n. 11). This is precisely the same fence that the State has tried to straddle throughout these many proceedings.

The Court, however, should have no trouble properly identifying what the enhancer is. When faced with a similar situation in *Garrett v. United States*, 471 U.S. 773, 782-783, 105 S.Ct. 2407, 2413-2414 (1985), the Court found that a provision providing for *enhanced* penalties was in fact a separate crime with separate penalties. The distinction was based on the fact that the provision was not aimed at a post-conviction presentencing procedure but was intended to be tried in all its parts before the court. Mere labels are not dispositive; objective operative features are. *See also, United States v. Davis*, 801 F.2d 754, 755-756 (5th Cir. 1986). For the same reason, this *enhancer* is not a sentencing tool, but rather creates a new and separate crime, heard and punished in the guilt-phase of the trial.

[16] *Dawson*, at 1098. Information about defendant's associational contacts might have otherwise been relevant, but was inadmissible because it was "not relevant to help prove any aggravating circumstance."

By comparison, Wisconsin's "repeater" *enhances* penalties, but no evidence relating to the repeater may be heard during the guilt-phase of the trial.[17] Nor should anyone be fooled by the misleading reference to "*[t]he fact-finder then separately renders a 'special verdict'*" (Pet. 6). This was no bifurcated trial. All evidence for the enhancer was heard directly during the trial, and the "special verdict" was nothing more than the next item to be checked on a single jury verdict form.

The second basic flaw in the State's argument is that *Dawson* does not stand for this at all! *Dawson* did not *expand* the scope of information which a sentencing court may consider, but rather restricted this information to that which is directly relevant to the crime.(*Id.* at 1098) *Dawson* did not say that if certain information is relevant within capital sentencing proceedings that it should therefore be converted into an element and chargeable directly in the principal count during the trial. Nor did *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983). Ironically for the State's purposes, all the statements marshalled to emphasize a sentencing court's *relatively* wide discretion make sense only by contrast to the more *limited* discretion to receive information in the *guilt-phase* of the trial. This distinction was critical to the Wisconsin Supreme Court.[18]

The State has otherwise distorted the Court's teachings on capital sentencing issues. Seeking to find support for its claim that it may punish motive, the State purports to find analogies buried within specific sentencing schemes. The State writes, "[t]here is no reason to suppose that the Constitution forbids a legislature from defining a crime in terms of motive. For

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[17] Wis. Stat. § 939.62. *See, Block v. State*, 163 N.W.2d 196, 41 Wis.2d 205 (1968); and, *Mulkovich v. State*, 243 N.W.2d 198, 73 Wis.2d 464 (1976).

[18] "Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." (P.A. 16 n. 17)

example, a capital sentencing scheme that authorizes the death penalty if an offender is motivated by a desire for money does not violate the Constitution. *Jurek v. Texas*, 428 U.S. 262 (1976)."(Pet. 35)...Besides the fact that nothing even close to such a holding may be drawn from that case[19], *Jurek* and related cases serve to underscore our point that the enhancer is not just another sentencing tool, but rather a fully separate charge. In *McClesky v. Kemp*, 481 U.S. 279, 302, 107 S.Ct. 1756, 1772 (1987) the Court approved Georgia's reformed capital punishment practices because, among other reasons, the new practice "*bifurcates guilt and sentencing proceedings so that the jury can receive all relevant information for sentencing without risk that evidence irrelevant to the defendant's guilt will influence the jury's consideration of that issue.*"(emphasis supplied) It follows that all evidence brought in for the enhancer would be "*irrelevant to the defendant's guilt*" because the underlying charges do not concern themselves with whom or why a particular person was chosen. Doing *Dawson* one better, however, the *Anti-Defamation League Brief* suggested that being charged in the guilt-phase of the trial might actually be more beneficial to the defendant.[20] This is curious reasoning, however. According to this logic the defendant would receive the *benefit* of the enhancer evidence *once* to influence his initial charge of guilt and then receive it *again* when the judge uses discretion to increase *that* sentence. ... The ability to "beat the charges" is beside the point. It is the propriety of the charge itself which is at issue.

Finally, with regard to "*discretion*" in terms of sentencing, the State explained in its Brief for Certiorari that the "single exception" to the rule that "the penalty enhancer statute

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[19] Title 5, § 19.03(a)(3) of the statute to which the State is referring does not say "*if an offender is motivated by a desire for money,*" but instead applies if, "*the person commits the murder for remuneration ... or employs another to commit the murder...*" The Court held on the *process*.

[20] "[A] defendant for whom the prosecutor seeks an enhanced penalty is afforded far greater procedural safeguards under the Wisconsin law than without it ...(*continues*)"(p. 23)

merely gives a judge more discretion" is § 939.645(2)(b).(Pet. Cert. 4 n.1) That section directs that a Class A misdemeanor become a felony. In the context of these crimes and the overall problem, however, that is a very misleading view. Fully three-quarters of the bias crimes reported though the FBI recording system were vandalism, intimidation, and simple assault, precisely the crimes where this "single exception" would hit with most force and most frequency.[21]

WHAT ROLE DOES MOTIVE PLAY IN THE ENHANCER?

Ascertaining the precise role of *motive* in the enhancer's operation is critical. Regardless of what one thinks about punishing motive, the statute cannot survive overbreadth and vagueness challenges unless and until the State clarifies exactly what role motive is to play in triggering the enhancer. Either the State admit that it is targeting motive, and thereby be forced to rely solely on its overly broad reading of *Dawson* and its mischaracterization of the enhancer as merely another sentencing tool. Or the State attempt to deny targeting motive, in which case it will be forced to explain how it can prove, much less define or identify *"discriminatory"* selection. Accordingly, the State must answer three simple questions: (1) Is motive the extra "element" required by the enhancer? (2) What quantum, or amount, of motivation is required to trigger the enhancer? (3) What type of motive is required? A brief review of the State's shifting position on this crucial issue follows.

Until citing *Dawson* in the Brief for Certiorari, the State consistently refused to admit that it was bad motive which the

[21] *Press Release* (initial findings report, January 1993); Federal Bureau of Investigation, U.S. Department of Justice. This also indicates that Wisconsin is second only to New York in the number of agencies participating; (copy attached). The majority of offenders are youth between the ages of 16 and 25 years old. *Hate Crime Statistics Act of 1988*, 1988 *Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary*, United States Senate, 100th Congress, 2nd Session, (1988) (Abt report, p. 178).

enhancer was targeting. (*compare* Pet. Cert. 13 *with* Pet. Wis.S. Ct. 23) Even now, it still hedges its bet by implying that a showing of impermissible motive is not required. Before the Wisconsin Supreme Court the State insisted that it did not have to prove "motivation" to employ the enhancer. *"[R]egardless of underlying motivation,"* it was the "act" of intentionally selecting a victim because of his or her race, etc, which was punished. (Pet. Wis.S.Ct. 23) *However*, at another point, when chasing different prey, the State explained, "It is the state's position that the term 'because of' does not indicate that the status of the victim must be the sole or principle *motivating factor.*"(Pet. Wis.S.Ct. 16 n. 3)(emphasis added) So this is how the case left the Wisconsin Supreme Court; the State denies motive is needed, but defines the scope in terms of motivating factors.

In the Brief for Certiorari, having now hitched its wagon to *Dawson*, the State concedes, albeit still tentatively, that it is indeed targeting motive.(Pet. Cert. 13) Yet, in the same brief, the State explains that, "[t]he penalty enhancer does not require a showing of *any particular motive* for the intentional *discriminatory* selection."(Pet. Cert. 5)(emphasis added) But this is doublespeak. *Some* motive is required, then; but how can this *some* motive not be "any particular" motive when it is a "discriminatory" selection which the State seeks to prove?

In its final Brief, the State now freely admits that it is targeting discriminatory motive. The penalty enhancer, it explains, targets offenses caused by "the *discriminatory motive* of the actor."(Pet. 8)[22] Nevertheless, having cleared the section on sentencing cases, and in preparation for *R.A.V.*, the State returns to statements like, "the enhancer does not define itself in terms of 'motive'"(Pet. 34) and, "[t]he enhancer does not require proof of mental process beyond intentional selection because of status."(Pet. 37) ... Of course, this paraphrase of the enhancer's

[22] The State attempted to link the enhancer to anti-discrimination laws with the statement we analyzed above. The State also adds, "the only feature which differentiates discriminatory acts from other acts is the *motive* of the actor." (Pet. 22)(emphasis supplied).

own language *answers* nothing. The State still will not say clearly whether the enhancer is a motive-based or intent crime. The strain is visible as it straddles the two different interpretations. Finally, apparently frustrated with this exercise, the State tries to simply define away the nagging "motive/intent" problem. The State invokes the "*red herring*" doctrine. It asserts that "the 'intent/motive' distinction is a red herring in that it has *no constitutional significance*."(Pet. 35)(emphasis added) Of course, no authority is cited for this revolutionary concept. In effect, the State, unwilling to be pinned down, just throws up its hands and says that it doesn't make any difference. It had already expressed similar sentiments in its Brief for Certiorari: "Regardless of whether it is labeled 'purpose,' 'motive' or 'intent,' it is the desire of the actor that dictates whether the act is criminal."(Pet. Cert. 12)[23] --This confirms our fears. The only other area of law where one may be excused for using intent, purpose, and motive interchangeably and even simultaneously is within the anti-discrimination burden-shifting framework.

The two dissenting opinions in the Wisconsin Supreme Court take a very different approach. Unlike the State, both Justices see this as a directly punishable event, in the guilt-phase of the trial. Justice Bablitch describes this as the "act" and "conduct" of "intentional selection."(P.A. 65) He insists, the enhancer "does not look to motive."(P.A. 65)[24]

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[23] At least one of the *Amici*, however, agreed with this analysis. *See*, *Amici Brief of the Cities, et al.* (pp. 18-19)

[24] "[The enhancer] punishes the act of discriminatory selection plus criminal conduct. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them."(P.A. 55) ... This is a curious statement, however. Of course, bigots can "act" on their thoughts. They can do all sorts of noncriminal activities, all the while "acting" on their thoughts. The only time they cannot is when they commit a crime. The difference is that if they "act" on their bigoted thoughts to commit one crime, but then commit another

The majority, of course, responds that this is double-counting.[25] Since the "act" of committing the underlying intent crime already covers both *actus reus* and *mens rea* components, the only residual not accounted for is the subjective reason or motivation. The only explanation, then, is that this is not really what the dissent meant. It would appear that they mean the "*act of intentional selection*" to denote a *specific intent* as to the nature of that selection and the underlying offense, i.e., a new offense. There is some indication that this is what Justice Bablitch means.[26] Presumably, the enhancer would create a wholly new offense and/or it would sit atop a lesser-included-offense framework.[27] The problem is, this is not what the legislature enacted; it is not what the State says it is defending; it is not what the Wisconsin Supreme Court discharged. *Even so*, whether framed as a wholly separate offense or atop a lesser-included-offense scheme, the only *element* which differentiates the new enhancer crime from the regular crime or the lesser-included crime, would be that "extra bit" involving the *reason* for

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crime while "acting" on other thoughts, the former, but not the latter, could be punished by the enhancer. Moreover, "act" must have physical qualities. *See*, *Black's Law Dictionary*, 25 (6th ed. 1990); The *Restatement (Second) Torts*, § 2 (1965); *Model Penal Code*, § 1.13(2).

[25] "Selection of a victim is an element of the underlying offense, part of the defendant's 'intent' in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection."(P.A. 35)

[26] "[The enhancer] punishes more severely criminals who act with ... an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status." (P.A. 59)(emphasis supplied).

[27] In effect, *regular* battery would require "intentional selection" of *someone*; a *bias* battery would require *specific intent as the identity of the person selected*, i.e., because of that person's race, etc. Replicated across the code, this would create dual categories for each offense.

the decision, the *motive*.[28]

This "extra bit," we realize, transforms the event entirely. It imparts a directed and traumatizing injury inflicted upon the person for no other reason than the person's status. We have never disputed nor doubted the special harms which accompany these crimes. However, the immediate question in this context is not about *consequences*; nor even about legislative *power*. It is about *execution*. The question, then, is how do we define, identify, and then try in court that "extra bit"? *How* can the *element* which defines the crime be identified and quantified? It is still not clear whether this is a motivational-crime or a would-be intent crime(?). The point is that the legislative *power* question cannot be answered, or the principles at stake not truly "balanced," until the *execution* question is answered.

* Before leaving this section, we wish to mention that there is a colorable double jeopardy question. We raise it only to highlight the depth of the confusion about what this thing is[29]

WHAT QUANTUM OF MOTIVE IS REQUIRED?

The enhancer cannot survive vagueness or overbreadth unless the State can tell us what exactly triggers the enhancer. It must be clear to people of ordinary intelligence what the statute prohibits. This requirement, which derives from due process, is imperative when criminal penalties and First Amendment rights are involved.[30] The State has a duty to be clear about both the

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[28] *See*, LaFave, Scott, *Criminal Law*, § 3.5(e), (2nd ed. 1986)

[29] Two separate enhancer convictions *could* have been returned by the jury. If the gravamen is selection and that is an "act," then it seems clear that with only one victim selected, that only one charge could be returned. The enhancer cannot use itself to justify its own second application.

[30] *Grayned*, at 108-109, 2298-2299; *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193 (1982); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983) Fn. 8; *NAACP*

legal standard it is using, and also what *type* of behavior or speech, etc., it will consider as having violated the statute.

The phrase "*because of*" does not, by itself, indicate how much, or to what extent, the victim's status must motivate the selection decision. Whether it means "only", "sole", "primary", "substantial" or "in any part" is unclear. If this is an intent crime, the specific character of the *actus reus* must be explained; but how does one have "partial" intent? The State explains none of this, but does insist on maximum scope, however defined.[31]

The first talk of any specific limiting standards came in the dissent. Justice Bablitch asserted that the victim's status must be a "*substantial factor*" in the selection decision.(P.A. 71) However, he also advocated a "*but for*" standard.(P.A. 71) Since he mixes the two, one is uncertain which standard he would have the courts apply. ... *Besides*, why is Justice Bablitch discussing quantum causality factors at all when he maintains that this is an "intent" crime?[32] *Furthermore*, neither standard can be more than a suggestion. The Wisconsin State Legislature explicitly rejected the "*substantial factor*" test.[33] Clearly, a

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v. Button, 371 U.S. 415, 432, 83 S.Ct. 328, 337 (1963); *State v. Propanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983).

[31] In its brief to the Wisconsin Supreme Court the State refused to specify any particular standard, but did advise the court to "avoid using language in its published opinion which inadvertently might suggest that the penalty enhancer applies only if the victim was selected solely or principally due to race, etc." It also cited with approval an Oregon opinion which interpreted a similar Oregon statute to allow prosecution if the "unlawful motive plays any role" in the selection.(Pet. Wis.S.Ct. 16)

[32] *See*, LaFave, Scott, *Criminal Law*, § 3.12(b), (2nd ed. 1986); W. Page Keeton et al., *Prosser & Keeton on Torts*, § 41, (5th ed. 1984) "Substantial factor" goes to causality in the tort, it does not define a duty. *See, Sampson v. Laskin*, 224 N.W.2d 594, 597-98, 66 Wis.2d 318 (1975).

[33] The Legislature was offered, but rejected, an amendment which would have required the "substantial factor" test for restricting the sweep of the enhancer. ... "*was a substantial factor in making that selection*"

limiting construction cannot be framed around factors which the legislature has explicitly rejected.[34]

The State, apparently also unaware that it had been rejected, only now cautiously endorses the "*substantial factor*" test in a *footnote*.(P.A. 34 n. 4) It cited the dissent, but edited out reference to the "*but for*" test. Yet, in explaining the meaning of the "*substantial factor*" test, the State used the phrase, "*to the extent that in the absence of that status the perpetrator would not have selected the victim*," which is itself unmistakably a paraphrase of a "*but for*" test. How the State intends to get out of this forest is a good question.

In sum, the State failed to specify any intelligible standard until now. Even now it selects a standard which was explicitly rejected by the State legislature. In attempting to explain its new standard, the State used terminology which implicates yet another standard, one we know it does not want. And to top it off, this all takes place in the shadow of a legislature which amended the statute to effectively erase all possible limitations. Together, this collective failure to identify a standard is the essence of vagueness and the grist of overbreadth. Clearly, if the prosecutor cannot even tell us what the standard is, no person on the street can possibly know where the limits of the enhancer lie.

WHAT TYPE OF MOTIVE IS REQUIRED?

The last, and most difficult question for the State is what *type* of motive is required. Either the State admits that the enhancer targets biased motive and only biased motive and face

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(Assembly Amendment 1, to 1991 Assembly Bill 507; rejected, Ayes 85, Noes 10; *Bulletin of the Proceedings of the Wisconsin Legislature 1991-92 Session*, Period ending June 20, 1992; pp. 135-136) (Copy attached).

[34] *See* Edward J. DeBartolo v. Florida Gulf Coast, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988); United States v. Locke, 471 U.S. 84, 98, 105 S.Ct. 1785, 1794 (1985); State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42, 46-47 (1986). Nor would the "*in whole or in part*" amendment, made law by then, heed a restrictive "*but for*" standard.

the First Amendment head on, or it waffle and thereby admit that it cannot correct the vagueness and overbreadth problems. So far it has done both. When necessary to compile a compelling State interest, it has said that the enhancer would address those crimes which occur "because of the *discriminatory motive* of the actor."(p. 8)(emphasis added). Yet when facing *R.A.V.* it claims that "the enhancer does not define itself in terms of 'motive'" (Pet. 34) Similarly, both dissenting Justices speak uniformly about *discriminatory* selection, but have either denied that bad motive is required (Justice Bablitch) or have essentially side-stepped the question (Justice Abrahamson).[35] It is our contention that the enhancer not only *does* target biased motive and *only* biased motive, but that it must do so in order to defeat vagueness and overbreadth problems.

The State attempts to avoid the dilemma by saying that the enhancer does not *require* any particular showing of bias.[36] It repeated its "*impress his peers*" hypothetical to argue that, "the fact that Todd Mitchell may not hate whites *does not diminish the seriousness of his crime*."(Pet. 37)(emphasis supplied) ... Our response is, *Yes, it would!* By definition, it would not be a hate crime if the perpetrator had no biased attitude toward the victim. That is, as soon as the race, etc., of the victim becomes important to the commission of the crime, a hate crime has occurred. However, the State has neither reason nor justification

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[35] Justice Abrahamson admits that it is the "defendant's bigotry" which must be "linked" to the selection, but that this should be limited to a "tight nexus."(P.A. 51) This certainly sounds like punishing biased motive. Presumably the nexus serves protective/exclusionary evidentiary functions. However, tight nexus or otherwise, she does not explain how the "defendant's bigotry" can be linked to anything without first proving in court that the defendant is a bigot. Seen from this perspective, the "tightness" of the nexus would seem to apply only to contemporanity, not to substance. It is still a motive-based approach, regardless how garbed.

[36] This same argument is repeated by many of the Amici; *e.g.*,. *The Brief of the United States* (p. 28); *The Brief of the States* (p. 19); Even *The Brief of the ACLU* (p. 12); The *ACLU's* examples are worth reading.

to punish people under a hate crimes statute if they neither harbor nor display any bias. One suspects that the State's hypothetical is leaking; i.e., that it was important to "impress his friends" that the victim be white. If this is the case, then the perpetrator would have adopted the bias of his peers for the purposes of the statute. If so, then *that* fact would have to be proven for a conviction. Hence bias *is* required. However, if the State tries to say that not even that would be required, then it must be prepared to admit that it would be convicting someone for a hate crime without *any* showing of bias. Hate crimes are uniquely harmful not merely because hatred is *suspected*, but because the perpetrator *intended* to project hatred and that intention is understood *as such*. Without that intent there may be distrust and misunderstanding, but there is no hate crime. The attack on Reddick would be a *terror* crime; an intent to *terrorize* requires no extended inference, such as the inquiry into bias.

The reason for discussing the *type* of motive that is required is important not merely for First Amendment prohibitions on *content-based* penalties, which the enhancer violates, but before that and more fundamentally, this goes to the complete failure to specify any scienter requirement. *"Bigotry"* cannot serve as a scienter requirement. It is not an *"element"*. Recognizing this problem, the State now attempts to say that *bias* is not required. *Ironically*, however, removing the *bias* requirement at this point, although itself illegitimate as an *"element,"* would cast the penalty enhancer completely adrift. It would become a rogue and unpredictable law, threatening to label as hate crimes offenders people who neither harbor nor have displayed any bias. A reformulation is clearly necessary.

REFORMULATING THE PROBLEM

Defining a hate crime in terms of "intentionally selecting" a victim "because of" his or her race, etc., may seem reasonable, but upon closer scrutiny, it becomes apparent that the pathology of hate crimes requires the focus to be reversed. A more "accurate" approach, is operationalized around the selection of

the *crime*, with the selection of the victim being a function of the crime selection. That is, a hate crime is one where the crime is perpetrated because of the victim's status. This is how *we* would read both the *Hate Crime Statistics Act* and the *ADL Model* statute, i.e., as employing a crime-selection focus."[37]

The *ADL Model* statute, for instance, finds a violation if a crime selection is made "by reason of" the victim's status. Thus, even though the Wisconsin statute was "modeled" upon the *ADL* parent statute, the two are <u>not</u> the same. Understandably, the *ADL* has submitted an Amicus in favor of one of its offspring. However, to the extent this analysis holds, the Wisconsin statute should fall on vagueness and overbreadth, while the *ADL Model* could survive *facial* invalidity *on this point*. However, since the *ADL Model* does still effectively target bias, it would still face the same First Amendment challenges and due process problems associated with making bias a type of element and punishing that biased motive as such directly in the guilt-phase of a trial. But regardless, if Wisconsin still insists that it not need target bias, the following typology will illustrate the difference between the crime-focused and the victim-focused approaches. We posit three possible types of crimes/victim selection combinations:

(1) those in which a *crime* is planned, but the *victim* is not yet selected;

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[37] 28 U.S.C. 534 note., 104 Stat. 140, *Hate Crime Statistics Act*; and *Trainin, Guide for Hate Crime Data Collection*, U.S. Department of Justice, Federal Bureau of Investigation, 1991. Reports on "crimes that manifest evidence of prejudice ..."; The *ADL Model:* "A person commits the crime of intimidation if, by reason of the ... race, etc. ... he violates Section _____ of the Penal Code; *Hate Crimes Statutes: 1991 Status Report; Anti-Defamation League*; 1991; p. 4. Similarly, *H.R. 4797 Hate Crimes Sentencing Enhancement Act*, although vague, does also orients around crime selection. A "hate crime" is "a crime in which the defendant's conduct was motivated by hatred, bias or prejudice, based on" race, etc. Finally, the *Amici Brief for Members of Congress*, appear to be describing hate crimes, not like Wisconsin's statute, but rather with a starting point at crime selection.(p. 6).

(2) those in which the selection of the *crime* and the *victim* occur in the same transaction;
(3) those in which the *crime* is selected because of the *victim*;

The *first* category is one where there is a criminal who needs a victim. The crime is planned, but the victim is not yet chosen. A mugger intends to mug someone, but it remains for the victim to be selected. This is the *garden-variety* type.

The *second* type is intended to encompass situations in which there is an altercation, perhaps a scuffle or a fight. It is posited that no altercation was intended ahead of time by the perpetrator, but rather one developed after the perpetrator and the ultimate victim met in some situation.

The *third* type is where the *crime* is selected *because of* the victim's identity. The crime selection is dictated by the victim's identity and is undertaken to harm the victim because of the victim's status. This type is the truly malignant crime, the true *hate crime*. In this situation it makes little sense to speak of an "underlying" crime, because the criminal act itself has no independent meaning beyond harming the victim because of the victim's status. It is true that hate crimes can generate from both of the first two categories, but as soon as the mugger decides to harm the victim because of the victim's status, or as soon as the altercation is initiated (or perpetuated) to harm a victim because of his or her status, these types convert into the third category.

The Wisconsin statute will catch category three criminals. The problem is that it cannot avoid sweeping in a host of "ordinary" crime situations which would not be considered "hate crimes" by any common understanding. If no showing of bias is required, it is a sure bet that our *garden-variety* criminal will soon become a hate crimes offender. This occurs *even if* we put the quantum requirement way up to "*deciding factor*," or even to *certainty!* A couple hypotheticals:

Assume as fact that our criminal "*intentionally selected*" a victim "*because of*" the race, religion, or ethnic group, etc.; but also assume as "fact" that our criminal harbors absolutely no status-based malice. Guilty or Not Guilty?

(1) Our criminal selects a white victim because he or she believes that white people have more money.
(2) Our criminal selects a black victim because he or she believes the police are less likely to respond effectively in that neighborhood.
(3) Our criminal selects someone from a particular ethnic group because that group is known to be wary of banks and typically keep rolls of cash in their mattresses.
(4) Our criminal becomes a sex offender and selects someone from the race he or she prefers.
(5) Our criminal needs cash and robs the store of someone he knows to be at worship at that hour.

According to the Wisconsin hate crimes enhancer we would now have five convictions for hate crimes.[38]

It has also begun to dawn on some that this formula would probably lead to minorities being punished more frequently than others. If the *Brief of the Crown Heights Coalition, NAACP, and the American Jewish Committee* truly believes in its examples, then this result seems a strong possibility.[39] The *Brief of the ACLU*, evidently a little nervous about these laws, urges courts to be "vigilant" to ensure that hate crime statutes "do not themselves become a vehicle for discrimination against minority groups." (p. 22). But how do they expect the courts to do that? Presumably the courts are there to enforce the laws as written. Quite simply, the courts would not need to be more "*vigilant*" if these laws were written better.

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[38] These examples are our own, but we noticed that one of Petitioner's Amici, *Brief of the Crown Heights Coalition, NAACP, and the American Jewish Committee*, included almost identical examples which they cited with approval!

[39] *Black Victims*, Special Report: Bureau of Justice Statistics, U.S. Department of Justice, April 1990. The figures indicate that, of all crimes of violence committed by single offenders against white or black victims, 69% involve a white offender and a white victim, 15% involved a black offender and a white victim, 11% involved a black offender and a black victim, and 2% involved a white offender and a black victim.

Next assume that our criminal consciously sought to *comply* with the enhancer, i.e., avoid intentionally selecting anybody because of that person's race, etc. How could this be done? To be entirely safe, the "complying criminal" might simply avoid all victims of another race, etc. This may well be a correct assessment, but it should not be. By intentionally avoiding people outside his or her own race, etc., our criminal would, by definition, be *intentionally selecting* victims within his or her race, etc. *because of* their race, etc. This is not only a literal violation, but it would seem to fit the rationale of the law as well. Now our complying criminal is in quite a quandary. Should our criminal distribute his or her victims proportionately among the various groups in the area? ... It would seem that the only "safe" crime, in terms of the enhancer, would be Justice Bablitch's "random" or "happenstance" crimes, whatever they are supposed to be in the context of *intent* crimes.(P.A. 64)

The *altercation* situation raises all of these problems and more. We have posited that these are situations where no confrontation was planned, but rather developed out of the situation. There are countless hypotheticals, but basically two sets of problems. The first is when racial insults or epithets are used during an altercation. It was this situation which particularly concerned the Wisconsin Supreme Court. It worried that the use of one bad word, unleashed in the heat of anger, could mean the difference between facing a battery or facing a battery plus a hate crimes enhancer charge.(P.A. 44) Nor could we rely upon traditional evidentiary rules. These rules revolve around relevance. If bias is made an *element*, the protections in the rules would be largely disabled.

The second, and more intractable problem is that of "mixed-motives" situations. Here the issue of *quantum* and *type* of motive becomes very difficult to apply. We are used to punishing for multiple intents, but it makes little sense to speak of *partial* or *mixed* intent. The prospect of importing mixed-motive logic and procedures from employment law into the criminal law is unsettling at best. A "*but for*" test, if administered literally, would put away many people who would

otherwise not be considered hate crimes offenders, especially if one factors in "subconscious" racism. And if not administered literally, then what? *Price Waterhouse*?

Finally, who is to determine what constitutes bias? And how? In the sentencing context, with presentencing reports, etc., courts generally can handle such questions with due competence. Placing this question in a trial, however, is a much different matter. Asking the judge or jury to determine whether someone is guilty of the element of bias in a criminal trial cuts too close to the protections the First Amendment affords to even those we rightfully denounce. Prosecuting someone for *terror* would not offend this; making *bias* an element would. Nor is it an answer to say that courts are constantly faced with these types of difficult problems. The ability to reach an *outcome* is not the same thing as *competence*. The whole point of our First Amendment and evidentiary rules protections is to deny courts the opportunity to even *seek* competence in such matters.

CONCLUDING REMARKS

Since it is category three that we all agree should be targeted, we again suggest that an *anti-terror* statute could reach these crimes without taking recourse to *content-based* criteria. An *anti-terror* statute would provide a specifiable *actus reus* and objective referent for intent, comparable to *interference* in civil rights provisions. It would also address the *effects* directly; making it even more protective than hate crimes statutes, which are actually underinclusive. Hatred may be sufficient for terror, but is not necessary. It has also been suggested that an *anti-terror* statute could incorporate community-group referents, thereby encompassing communities as communities and not merely because of certain immutable characteristics the people there share. Finally, we have suggested more vigorous use of aggravating factors. Since it is very likely that a hate crime will involve aggravating factors, the availability of this tool is not an issue. The current training law enforcement is receiving in bias crimes could be applied equally effectively through these tools.

Perhaps most importantly, we would urge resistance to laws which reinforce the pressures to define ourselves separately as groups instead of as one people. Some may believe it naive to still believe in one integrated society in America, and it may be, but we are certain never to achieve this goal if we do not focus all our energies and efforts to constantly serve and reflect that goal. Content-neutrality is one of the values offended, at least in process, by these laws. Group-neutrality is a value which, while not offended, may not be properly served by this type of law. As we become a very different country entering the twenty-first century, we should take care to ensure that our goal of integration tomorrow is served by the laws of today. With this we make no reference here to Affirmative Action, a policy which on its terms could not be achieved by a group-neutral alternative. However, that is not the case here. We know that integration is harmed by hate crimes, and for that reason seek to combat them. However, we also believe that integration may not be best served by laws which tend to classify us by group. There are a lot of unanswered questions about the group focus of these laws. The *ADL Model* has given some uniformity, but many variations exist. That opens onto questions. How, for instance, do groups, or rather status-groups get onto the list? How do we rationalize denying some group entry? Surely we cannot say because the group does not have enough votes. The whole point is to assist groups which cannot otherwise sufficiently defend themselves. How do we justify having "sexual orientation" on one list but not another? What about gender? Wisconsin included disability, why have others not done so? Could we ever justify taking a group off the list at some point? What would that signify? How will a listing in these statutes intersect with other laws? Would an appropriate listing have allowed another result in *Bray*? But most importantly, how will the listing impact upon the groups themselves and on relations amongst groups? The Court cannot legislate, but neither need it accept a compelling State interest without some inquiry as to the larger effects this method would have, especially when there are content-neutral alternatives to achieve the same ends.

1991-92 Legislature STATE OF WISCONSIN LRBa1096/1
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ASSEMBLY AMENDMENT 1

TO 1991 ASSEMBLY BILL 507

October 16, 1991 - Offered by Representative YOUNG.

At the locations indicated, amend the bill as follows:

1. Page 2, line 4: delete lines 4 to 7 and substitute: "damaged or otherwise affected by the crime under par. (a) ~~because of~~ and the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property was a substantial factor in making that selection, whether".

(End)

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535

FOR IMMEDIATE RELEASE

Director William S. Sessions today released the first data available from the FBI's statistical program on hate crimes. The program was initiated in response to the Hate Crime Statistics Act of 1990 and is being implemented by law enforcement agencies across the Nation. "While these initial data are limited," commented Director Sessions, "they give us our first assessment of the nature of crimes motivated by bias in our society." The data cover calendar year 1991 and were supplied by nearly 3,000 law enforcement agencies in 32 states. Hate crime occurrences were recorded by 27 percent of the 2,771 agencies participating; the remainder reported no such offenses came to their attention.

A total of 4,558 hate crime incidents involving 4,755 offenses were reported in 1991. Among the offenses measured, intimidation was the most frequently reported hate crime, accounting for 1 of 3 offenses. Following were destruction/damage/vandalism of property, 27 percent; simple assault, 17 percent; aggravated assault, 16 percent; and robbery, 3 percent. The remaining offense types; murder, forcible rape, burglary, larceny-theft, motor vehicle theft, and arson; each accounted for 1 percent or less of the total.

Racial bias motivated 6 of 10 offenses reported; religious bias, 2 of 10; and ethnic and sexual-orientation bias, each 1 of 10. Among the specific bias types, anti-black offenses accounted for the highest percentage, 36 percent of the total. Anti-white and anti-Jewish motivations followed with 19 and 17 percent, respectively.

Information concerning the offenders was unknown for 43 percent of the incidents reported. Considering incidents for which suspected race of the offender was reported, 65 percent of the hate crimes were committed by whites, 30 percent by blacks, and 2 percent by persons of other races. The remainder of the incidents were committed by groups of offenders not all of the same race.

The accompanying tables provide specific hate crime data. A more comprehensive report is planned for the spring of 1993.

Hate Crime Offense Codes Reported, 1991

	Number	Percent*
Murder	12	.3
Forcible Rape	7	.1
Robbery	119	2.5
Aggravated Assault	773	16.3
Burglary	56	1.2
Larceny-theft	22	0.5
Motor Vehicle Theft	0	0.0
Arson	55	1.2
Simple Assault	796	16.7
Intimidation	1,614	33.9
Destruction/Damage/Vandalism of Property	1,301	27.4
Total Number of Offense Types	4,755	100.0

*Because of rounding, percentages do not add to total.

Hate Crime Bias-Motivations Reported, 1991

Bias-Motivation	Number	Percent*
Race	**2,963**	**62.3**
Anti-White	888	18.7
Anti-Black	1,689	35.5
Anti-American Indian/Alaskan Native	11	0.2
Anti-Asian/Pacific Islander	287	6.0
Anti-Multi-Racial Group	88	1.9
Ethnicity	**450**	**9.5**
Anti-Hispanic	242	5.1
Anti-Other Ethnicity/National Origin	208	4.4
Religion	**917**	**19.3**
Anti-Jewish	792	16.7
Anti-Catholic	23	0.5
Anti-Protestant	26	0.5
Anti-Islamic (Moslem)	10	0.2
Anti-Other Religion	51	1.1
Anti-Multi-Religious Group	11	0.2
Anti-Atheism/Agnosticism/etc.	4	0.1
Sexual Orientation	**425**	**8.9**
Anti-Homosexual	421	8.9
Anti-Heterosexual	3	0.1
Anti-Bisexual	1	0.0
Total	4,755	100.0

*Because of rounding, percentages may not add to totals.

Suspected Race of Offenders in Hate Crimes, 1991

Suspected Race of Offender	Number of Incidents	Percent
White	1,679	36.8
Black	769	16.9
American Indian/Alaskan Native	12	0.3
Asian/Pacific Islander	47	1.0
Multi-racial group	77	1.7
Unknown	1,974	43.3
Total Incidents	4,558*	100.0

*A single incident may involve more than one offense.

Agency Participation in Hate Crime Reporting, 1991

State	Agencies Participating*	Incidents Reported
ARIZONA	1	48
ARKANSAS	169	10
CALIFORNIA	2	5
COLORADO	194	128
CONNECTICUT	29	69
DELAWARE	58	29
GEORGIA	2	23
IDAHO	98	33
ILLINOIS	26	133
INDIANA	1	0
IOWA	201	89
KANSAS	3	6
KENTUCKY	1	0
LOUISIANA	6	0
MARYLAND	156	431
MASSACHUSETTS	30	200
MINNESOTA	42	225
MISSISSIPPI	4	1
MISSOURI	18	136
NEVADA	1	16
NEW JERSEY	271	895
NEW MEXICO	1	0
NEW YORK	773	943
OHIO	30	80
OKLAHOMA	7	99
OREGON	39	296
PENNSYLVANIA	50	277
TENNESSEE	2	1
TEXAS	28	95
VIRGINIA	19	53
WASHINGTON	206	196
WISCONSIN	303	41
Total	2,771	4,558

*Includes agencies participating in Program whether or not any incidents were experienced.

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Supreme Court, U.S.
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No. 92-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On A Writ of *Certiorari*
To The Supreme Court of Wisconsin

BRIEF OF THE REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-515

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On A Writ of *Certiorari*
To The Supreme Court of Wisconsin

BRIEF OF THE REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The Reason Foundation is a California, non-profit organization whose goal is to promote the following principles of a free society: limited government, property rights, personal liberties, and a free-market system. The

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[1]Reason Foundation, 3415 Sepulveda Blvd., Suite 400, Los Angeles, CA 90034. Letters of consent to the filing of this brief have been submitted to the Clerk of Court pursuant to Rule 37.3.

Foundation, founded in 1978, is interested in advancing ideas that have a theoretical or practical application for public policy and current affairs. Its projects include *Reason* magazine and a research program.

The issue in this case is of interest to the Reason Foundation because penalty enhancement statutes pose a serious threat to First Amendment liberties.[2] Since Wisconsin's penalty enhancement statute so clearly implicates both the role of government in regulating speech and the liberty of the individual to express even biased thoughts, this case deals with matters of fundamental importance to the Reason Foundation. In keeping with its emphasis on limited government, the Reason Foundation opposes the penalty enhancement statute. We submit this *amicus curiae* brief to offer the Court the benefit of our views.

SUMMARY OF ARGUMENT

The dissenting opinion of Justice Bablitch in *State v. Mitchell*, 485 N.W.2d 807 (1992), compared the Wisconsin penalty enhancement statute, Wis. Stat. § 939.645 (1989-90), to civil antidiscrimination laws. *Id.* at 819-20 (Bablitch, J., dissenting). The majority opinion rejected this analogy and drew a distinction between civil and criminal antidiscrimination statutes. *Id.* at 817. The majority did not analyze the constitutional differences between the civil and criminal statutes but simply stated that the differences present a "schism in the First Amendment's protective shield," *Id.* However, a more extensive analysis of the radical constitutional difference between civil and criminal antidiscrimination statutes shows that they are similar in name only. Such analysis also shows that the penalty

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[2]*See* Jacob Sullum, *What's Hate Got To Do With It? Do Crimes of Bigotry Deserve Extra Punishment?* REASON, December 1992 at 15.

enhancement statute does not penalize conduct. It penalizes thought.

We leave to the parties and the other *amici* the analysis of why the statute violates the First Amendment. This brief will concentrate on analyzing the constitutional differences between civil antidiscrimination laws and the penalty enhancement statute to show that the latter does penalize thought rather than conduct. Thus, the analysis will ultimately demonstrate that the penalty enhancement statute violates the First Amendment, as the Wisconsin Supreme Court correctly concluded.

Penalty enhancement statutes for bias crimes are different from civil antidiscrimination laws because criminal defendants are protected by the Fifth Amendment. The Fifth Amendment protects the defendant from being punished more than once for the same offense, and it guarantees the defendant the right to put on a legitimate defense to criminal charges without risking self-incrimination imposed by the government. Wisconsin's penalty enhancement statute potentially violates each of these protections.

As a preliminary matter, it is important to note that penalty enhancement statutes for crimes with a bias motive are not actually antidiscrimination laws. There is no such thing as an equal opportunity to be a crime victim which the state has an interest in protecting. Nor should perpetrators of random crimes be less severely punished than perpetrators who intentionally select their victim. Yet this is the logical conclusion and consequence of viewing the penalty enhancement statute as simply another antidiscrimination law.

Moreover, it is a misnomer and redundant to call these

laws "hate crimes" statutes, as if "hate crimes" were a distinct species of crime. All crimes are "hate" crimes because crime involves violating the person or property of another in some way. The logical opposite of a "hate crime," namely a "love crime," is a contradiction in terms.

ARGUMENT

I. WHEN TRADITIONAL DOUBLE JEOPARDY ANALYSIS IS APPLIED TO MITCHELL'S CASE, IT BECOMES CLEAR THAT WISCONSIN'S PENALTY ENHANCEMENT STATUTE PROHIBITS THOUGHT RATHER THAN CONDUCT.

Proponents of Wisconsin's penalty enhancement statute argue that the statute punishes conduct, not thought. However, if the gravamen of the offense is conduct rather than thought, the statute violates the Fifth Amendment's Double Jeopardy Clause because the statute prohibits the same *actus reus* and the same *mens rea* for which the jury is required to find guilt under the criminal statute for the underlying crime. Since the jury must find a separate verdict of guilt under the penalty enhancement statute, the jury must therefore find the defendant guilty twice for the same *actus reus* and the same *mens rea*.

This double jeopardy problem is avoided if the defendant's biased motive when committing the underlying crime is the gravamen of the offense under the penalty enhancement statute. However, if biased motive is the gravamen of the offense, then the statute punishes thought and must be judged by the demands of the First Amendment.

This constitutional dilemma between Fifth Amendment

and First Amendment concerns is clarified by applying this Court's double jeopardy jurisprudence to the statute.

The Fifth Amendment's Double Jeopardy Clause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *See also Grady v. Corbin*, 110 S. Ct. 2084, 2090 (1990); *Missouri v. Hunter*, 459 U.S. 359 (1983); *Whalen v. United States*, 445 U.S. 684, 688, 700 (1980).[3]

There are two inquiries relevant to deciding whether multiple punishment is permitted in a particular case.[4] The first focuses on the word *offense* and the second on the word *punishment*. In the first inquiry, the question is whether the defendant is being prosecuted for one *offense* or multiple *offenses*. *See Blockburger v. United States*, 284 U.S. 299 (1932). This question arises when the defendant has engaged in a single course of conduct that appears to violate several statutes. If it is determined that there are multiple *offenses*, the question then becomes whether the legislature explicitly authorized multiple *punishment*. *See Missouri v. Hunter*, 459 U.S. 359 (1983). This Court has determined that, except when there is a question of separate trials, if a defendant has committed multiple offenses, the Double Jeopardy Clause

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[3]The Double Jeopardy Clause of the U.S. Constitution does not mention the word *punishment*. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. CONST. amend V. However, Wisconsin's Double Jeopardy Clause explicitly uses the word *punishment*. "[N]o person for the same offense may be put twice in jeopardy of punishment ...." WIS. CONST. art. I, § 8.

[4]There is also a third question not relevant in this case. It asks whether there was a single trial or multiple trials.

does not prohibit the legislature from prescribing multiple punishment, even if the defendant committed the multiple offenses during a single course of conduct or transaction. *See Id* at 367-68.

To determine whether a defendant has committed multiple offenses, the relevant statutes must be compared to determine whether "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. When the relevant statutes in the instant case are compared, it is apparent that the elements of the two statutes are the same, except for the penalty enhancement's provision concerning a biased motive. *Compare* Wis. Stat. § 940.19(1m) (the aggravated battery statute for the underlying crime) *with* Wis. Stat. § 939.645 (the penalty enhancement statute).

The *actus reus* element of both statutes is the same -- namely, the underlying prohibited activity. In Mitchell's case, the *actus reus* under both statutes was Mitchell's being party to the crime of aggravated battery against one victim. The *mens rea* element is also the same in each statute -- that is, the defendant's intent to select a victim for the prohibited activity. In Mitchell's case, the *mens rea* was selecting a victim for aggravated battery. Proponents of the penalty enhancement statute would argue that selecting a victim for racial reasons is a different *mens rea* than simply selecting a victim. However, it is the intent element of a crime that constitutes the *mens rea*, not the reason for that intent. While the two statutes do not differ in *actus reus* or *mens rea*, they differ because the penalty enhancement statute includes a biased motive provision not found in the statute for the underlying crime. However, a biased motive is thought, not conduct.

This *Blockburger* analysis leads to the conclusion that the penalty enhancement statute either punishes the same *actus reus* and the same *mens rea* as the statute for the underlying crime, or else it punishes a biased motive. In either case, there is a constitutional problem with the penalty enhancement statute. If the penalty enhancement statute punishes the *actus reus* and *mens rea*, there is a double jeopardy problem. If it punishes the biased motive, there is a First Amendment problem.

A literal reading of this Court's leading cases on single-trial, multiple-punishment cases seems to indicate that only legislative intent analysis solves a double jeopardy problem for a single-trial case, even if the *Blockburger* analysis shows there is only one offense. *See Whalen*, 445 U.S. at 692-95; *Hunter*, 459 U.S. at 366-69. In *Hunter*, *Id.* at 366, this Court said:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended....

However, to apply that quote, or similar statements from other decisions, to all single-trial, multiple-punishment cases would be to ignore the particular facts of *Hunter* and other similar double jeopardy cases. This Court was able to resolve *Hunter* with legislative intent analysis because, in that case, the defendant had engaged in more than one *actus reus* and evidenced more than one *mens rea* during the single course of conduct. Thus, there was more than one offense.

In *Hunter*, the defendant engaged in armed criminal action and first degree robbery. This involved two separate

choices : the choice to commit a robbery and the choice to use a weapon. This Court concluded that multiple punishment for the two offenses was permissible because the legislature had indicated an intent to punish twice for the two offenses. *Hunter*, 459 U.S. at 368.[5]

Thus, where a defendant engages in more than one *actus reus* and exhibits more than one *mens rea* during a single course of conduct, the choice about multiple punishment is entirely a legislative choice and is not a constitutional problem. *See Whalen*, 445. U.S. at 730 (Rehnquist, C.J., dissenting). However, in cases like the instant one where two statutes prohibit only one *actus reus* and one *mens rea*, there is only one offense, and legislative intent analysis cannot control the resolution of the double jeopardy issue.

Legislative intent analysis cannot control single-offense, multiple-punishment cases because the Constitution stands in judgment of the legislature, not the legislature in judgment of the Constitution. The Constitution has mandated that there cannot be multiple punishment for a single *offense*. It would be pure nominalism to say that the legislature's intent mandates a conclusion that there are multiple offenses, even where there is only one *actus reus* and one *mens rea*. That would constitute a distortion of the word *offense* beyond all the bounds of common sense and would nullify any meaningful protection afforded by the Double Jeopardy Clause.

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[5]The case of *Albernaz v. United States*, 450 U.S. 333 (1981) was discussed extensively in *Hunter*. In *Albernaz*, there was also more than one *actus reus* and one *mens rea*. The defendant had conspired to import marihuana and to distribute marihuana. This Court concluded that Congress intended to impose multiple punishment.

In summary, traditional double jeopardy analysis shows that there is a double jeopardy problem with the penalty enhancement statute if it prohibits conduct rather than thought because the statute prohibits the same *actus reus* and same *mens rea* as the statute for the underlying crime. This double jeopardy problem cannot be solved simply by looking to legislative intent regarding multiple punishment because legislative intent controls only where there are multiple offenses. However, here there is only one offense because there is only one *actus reus* and one *mens rea*.

This potential double jeopardy problem is one of the ways in which the penalty enhancement statute differs from civil antidiscrimination laws. The civil laws purport to correct the harmful effects of discriminatory conduct. However, the regulation of conduct under the civil law has not been made subject to the demands of the double jeopardy clause.

II. UNLIKE CIVIL ANTIDISCRIMINATION LAWS, WISCONSIN'S PENALTY ENHANCEMENT STATUTE JEOPARDIZES THE DEFENDANT'S FIFTH AMENDMENT RIGHT TO PUT ON A LEGITIMATE DEFENSE BECAUSE THE STATUTE TRAPS A DEFENDANT INTO SELF-INCRIMINATION IF THE DEFENDANT BASES A DEFENSE ON THE CLAIM THAT THE UNDERLYING CRIME WAS MITIGATED BY THE HEAT OF PASSION ARISING FROM INSTINCTUAL, PRE-RATIONAL BIAS AGAINST A GROUP PROTECTED BY THE STATUTE.

In some circumstances, Wisconsin's penalty enhancement statute could deter a defendant from putting on a defense to the underlying crime out of fear that the defense would lead

to self-incrimination under the penalty enhancement statute. This would occur if the penalty enhancement's prohibited reasons for selecting a victim were actually evidence of a mitigating factor in the commission of the underlying crime. In such a case, the defendant might be inhibited from arguing mitigation as a defense for the underlying criminal charge, since this would result in self-incrimination under the penalty enhancement statute.

Wisconsin's penalty enhancement statute criminalizes bias and prejudice as if these were always intentional acts. However, bias and prejudice are two-edged swords. They can fuel a reasoning process that culminates in the formation of evil intent, the *mens rea* of a crime. In such a case, bias and prejudice are evidence of an aggravating factor in the crime. However, bias and prejudice can also be inchoate and instinctual feelings, located in the emotions or passions and traceable to irrational fear and ignorance. In a volatile situation, these emotions often burst forth in the heat of passion as an angry response to a perceived wrong. In such a case, bias and prejudice could be evidence of mitigating factors to the crime.

Bias and prejudice are not praiseworthy when they arise from pre-rational emotions, but they are less blameworthy and more understandable. If bias and prejudice were recognized as evidence of possible mitigating factors, this would not indicate society's approval of bias and prejudice in themselves. Nor would it indicate that the defendant's right to put on a defense is so absolute that it can bow to no other values. For instance, a defendant has no right to commit perjury to put on a defense. What the acceptance of bias and prejudice as evidence of mitigating factors would indicate is simply that society has recognized heat of passion as a

legitimate defense to some crimes because heat of passion reduces free will and therefore reduces culpability. It would further indicate society's recognition that bias and prejudice are species within the generic category of irrational passions.

In the instant case, the defendant could legitimately have made the following argument that the racial hatred leading to his crime was actually a mitigating rather than an aggravating factor. His racist incitement to battery was an irrational, emotional response to the historical mistreatment of African-Americans in the movie *Mississippi Burning*, where white men beat a black boy who was praying. He could argue that discussion of the movie provoked an uncontrolled, emotional response in him that could never have been provoked in even the most empathetic white person, because a white person stands outside the circle of historical oppression experienced by African-Americans as a group. That emotional response caused the individual differences of people to blur and made him identify all whites with those who did the beating in the movie and identify himself with the African-American boy in the movie who had to defend himself.

The record of this case indicates that such a defense was within the realm of possibility and that the defendant's racist incitement to the beating could legitimately be seen as emotional rather than rational. The record indicates that it was the defendant himself who flagged down the police to assist the victim of the beating. This could show that his earlier action was not a reasoned choice. When reason calmed his emotions, humanitarian choices overcame his racial animosity.

Mitchell faced a constitutional dilemma if he had decided to put on a defense claiming that bias and prejudice were

evidence of mitigating rather than aggravating factors in the underlying crime. He would thereby have incriminated himself of violating the penalty enhancement statute. The statute forbids a racial motive in the selection of a victim. The hypothetical defense above does not deny the defendant's racial motive. Instead, it mitigates the *mens rea* for the aggravated battery. Thus, the defendant could still be convicted of violating the penalty enhancement statute, even if his defense succeeded in mitigating the underlying crime.

The statute, therefore, has an impermissible chilling effect on protected Fifth Amendment speech because it deters the defendant's exercise of his right to put on a defense to the underlying crime. This not only sets up a contradiction in the defendant's Fifth Amendment rights; it violates the First Amendment as well.

The potential contradiction in Fifth Amendment rights is what distinguishes the penalty enhancement statute from the sentencing, process where there can be legitimate consideration of relevant bias and prejudice. *See Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992); *Barclay v. Florida*, 463 U.S. 939, 949 (1983). At sentencing, a judge has the discretion to consider any relevant factor. Moreover, the defendant does not have to worry at sentencing that charges of bias and prejudice against him will negatively influence the jury in their deliberations about guilt or innocence for the underlying crime.

Its potential for causing a conflict in a defendant's Fifth Amendment rights is a second way that the penalty enhancement statute differs from civil antidiscrimination law. The defendant in a civil discrimination case does not risk self-incrimination by putting on a defense.

CONCLUSION

Too often, the legislature's answer to a societal problem is to throw a criminal law at it. This provides short-term emotional satisfaction and amasses political capital, but it provides little payoff in justice or in long-term solutions to problems. It also creates more problems than it solves.

The penalty enhancement statute for bias crimes is a prime example of this process of good intentions gone awry. The objective of the penalty enhancement statute is unquestionably praiseworthy -- namely, to stop insult from being added to injury when a crime assails the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry.[6] However, criminal law is an ineffective and inappropriate vehicle to achieve this objective.

The penalty enhancement statutes add further burdens to the already overburdened judicial system and prison system. Both the federal and state court systems are overloaded trying to adjudicate cases based on present laws. The penalty enhancement statute adds nothing substantive to criminal justice that cannot be accomplished by prosecution under the present Criminal Code, combined with the sentencing discretion of a judge to take evidence of bias or prejudice into account where it is relevant to the crime committed. Yet the penalty enhancement statute will cause trials to be more complex because of the separate verdict required and will give the defendant another avenue through which to challenge the conviction.

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[6]The bias crime statute in some states adds gender to this list. Wisconsin's statute does not include gender.

While the separation of powers does not permit this Court to prevent a legislature from passing useless laws, this Court can deter overzealous legislatures by meticulously examining useless laws to determine if they pass constitutional muster.

It is the position of this *amicus* that Wisconsin's penalty enhancement statute is not constitutional. It is not like civil antidiscrimination statutes. It punishes thought rather than conduct.

For the foregoing reasons, this Court should affirm the Wisconsin Supreme Court's judgment that Wis. Stat. § 939.645 is unconstitutional.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-515

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

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INTEREST OF THE AMICI CURIAE

The Amici States have attempted to regulate the growing problem of hate crime in America by passing laws that punish crime in which the victim is intentionally selected because of his or her race, ethnicity, religion, or other discriminatory distinction.[1] These laws are substantially similar in effect to the Wisconsin statute now before this Court. Indeed, challenges to similar laws from Ohio and Oregon are presently the subject of petitions for certiorari pending before this Court.[2]

Citizens of the Amici States have been criminally intimidated, harassed and assaulted solely because of their race, ethnicity, religion, or other discriminatory distinction. Furthermore, the incidence of hate crime is increasing. The Amici States have a compelling interest — indeed a duty — to combat the pernicious effects of such crime on victims and on society as a whole. That interest, recognized as compelling since Reconstruction, is no less compelling today.

Amici recognize their important responsibility to protect the civil rights of their citizens and to preserve the peace and order necessary to maintain the social fabric of society. By enhancing penalties for crime committed by reason of the victim's status, Amici are adopting responsive and responsible measures to ensure that their citizens' civil rights are protected. Indeed, such statutes are no different than

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[1] Forty-six states have passed legislation generically referred to as "hate crime" statutes. Many of these statutes are based on model hate crime statutes promoted by the Anti-Defamation League of B'nai B'rith. For a list of these statutes, see compendium to *Hate Crimes Statutes; A Response To Anti-Semitism, Vandalism, and Violent Bigotry*, Anti-Defamation League of B'nai B'rith (1990); and *Hate Crimes Statutes: A 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991).

[2] *State v. Wyant*, 64 Ohio St.3d 566, 597 N.E.2d 450 (1992) (Court struck down Ohio Revised Code §2927.12); *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992) (court upheld Oregon Revised Statutes §166.165(1)(a)(A)). The case numbers in this Court respectively are *Wyant*, No. 92-568, *Plowman*, No. 92-6702.

other federal and state antidiscrimination laws. Amici are also concerned with preserving the rights granted by the First Amendment. But those protections cannot be used to shield violations of the civil rights of others. The First Amendment cannot flourish in a society in which a substantial number of citizens are denied their civil rights by the commission of hate crime.

The faulty analysis of the court below threatens all hate crime statutes and undermines the ability of state legislatures to vindicate important societal interests. The threat is not limited to hate crime statutes. The Amici States have enacted civil antidiscrimination measures, including, in several of the Amici States, civil tort actions in which recovery is allowed for "hate violence" committed against the victim by reason of status. Amici urge this Court to uphold the constitutionality of the Wisconsin statute and allow the states to satisfy their obligation to protect their citizens from acts which constitute invidious discrimination.

SUMMARY OF ARGUMENT

In response to the terrible and growing problem of "hate crime" plaguing this nation, many states, including Wisconsin, have enacted laws punishing crime committed "by reason of" the victim's status. Hate crime is more harmful to victims than crime committed for non-status reasons, because of the physical, psychological, and emotional effects of such crime. Hate crime is also more harmful to society, because such crime invites escalation and retaliation by other members of the victim's class.

Most important, hate crime deprives people of the full enjoyment of their civil rights. The interest of society in preventing and punishing this type of crime is "compelling." Even while striking down one measure aimed at biased speech, this Court in *R.A.V. v. City of St. Paul*, 505 U.S. ____, 112 S.Ct. 2538 (1992), recognized the compelling nature of this interest.

This Court has always recognized the right of government to prevent deprivations of its citizens' civil rights. From Reconstruction forward, Congress has passed several antidiscrimination statutes regulating conduct committed by reason of the status of the victim. Amici States have also passed numerous antidiscrimination statutes regulating the same conduct. This Court has never held such statutes to be unconstitutional, even though "racial" or other class "animus" is an essential element of such statutes.

Class animus is the essence of invidious discrimination. This Court has repeatedly held that "acts of invidious discrimination . . . are entitled to no constitutional protection." *Roberts v. United States*, 468 U.S. 609, 628 (1984). In *R.A.V.*, this Court reaffirmed that antidiscrimination statutes are permissible regulations consistent with the First Amendment. *R.A.V.*, 505 U.S. ____ , 112 S.Ct. at 2546-7.

Federal legislation requiring proof of class animus as an element of a claim has not been limited to civil statutes. Several federal criminal statutes punish conduct committed "because of" the victim's status. *See e.g.* 18 U.S.C. §242. The Reconstruction Congress enacted such legislation in response to the "hate crime" of that era. Those "criminal" antidiscrimination laws, like their civil counterparts, have been repeatedly applied and upheld by this Court.

Just like the federal statutes, state "hate crime" statutes are antidiscrimination measures, designed to protect the civil rights of their citizens. The Wisconsin statute at issue is not directed at speech or thought, but at conduct — "hate crime." Such a statute does not violate the First Amendment. "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

This Court's decision in *R.A.V.* does not change this well established rule nor require invalidation of the Wisconsin statute. The fault of the St. Paul ordinance was that it was directed at the "message" and not the conduct by which the message was conveyed. In contrast, the Wisconsin statute is directed at conduct, since commission of a crime

is required. *R.A.V.* specifically recognizes that a statute directed at conduct, not speech, does not run afoul of the First Amendment.

This Court has repeatedly upheld, against First Amendment challenge, legislation directed at the non-expressive elements of conduct. *United States v. O'Brien*, 391 U.S. 367 (1968). The Wisconsin statute meets all of the *O'Brien* tests. The state has the power to punish criminal conduct; there is a compelling state interest in regulating the conduct herein; the state's interest is unrelated to expression; and the statute is narrowly tailored to regulate only crime, not speech or thought.

The court below misapprehended the Wisconsin statute. The basis for such a statute, like federal antidiscrimination statutes, is the offender's intentional selection of a victim. Offenders may hold whatever thoughts they wish or speak any idea; they simply may not convert their thoughts or speech into the commission of a crime.

The court below purported to distinguish between the Wisconsin statute and antidiscrimination laws, but the distinctions do not withstand analysis. It failed to explain why it is proper to consider racial or other class animus in some antidiscrimination laws, yet improper here. Racial or other class animus is the very basis of selection of the victim in antidiscrimination statutes. The constitutional analysis should not differ for hate crime statutes which require the same types of animus. Moreover, just as in 18 U.S.C. §242, the Wisconsin statute relates to an objective manifestation of discrimination — the commission of a crime.

The court below erroneously assumes that motive to commit a crime may never be punished. However, this Court's decision in *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality), counsels that motive may be considered as an element of punishment if it is material to the commission of a crime.

A legislature, as well as a sentencing judge as in *Barclay*, may consider the motive of "intentional selection" when it is material to assessing punishment.

ARGUMENT

I. THE STATES HAVE A COMPELLING INTEREST IN PREVENTING HARM TO MEMBERS OF GROUPS WHO ARE SUBJECT TO DISCRIMINATION BECAUSE OF THEIR RACE, ETHNICITY, RELIGION, OR OTHER DISCRIMINATORY DISTINCTION.

A. The States Have A Compelling Interest In Protecting Their Citizens' Civil Rights By Addressing The Surge In Crime Committed Because Of A Victim's Race, Religion, Ethnicity, Or Other Discriminatory Distinction.

Denial of civil rights on the basis of race, ethnicity, religion, or other discriminatory distinction has not disappeared; on the contrary, it is experiencing a resurgence and manifesting itself in the commission of crime in which the victim is selected because of his or her status.

"Hate crime" has increased all across the nation, along with a broadening of the classes of perpetrators and targets. William M. Welch, *Tensions Between Clashing Cultures Lead To More Hate Crimes*, The Associated Press, September 9, 1991, Washington Dateline Section. In New Jersey, such crime increased 18 percent in 1991, the fourth increase in a row. Jerry Gray, *Bias Crime Rate Up 18%, And Juveniles Led The Surge*, New York Times, April 4, 1992, §1 at 29. Similarly, Los Angeles County reported that hate crime reached record levels in 1991, increasing 22% over 1990 levels and constituting the seventh consecutive year for an increase. Stephanie Chavez, *Hate Crimes Set A Record In L.A. County*, Los Angeles Times, March 20, 1992 §A at 1 ("L.A. Hate Crimes").

These statistics are not anomalous. The number of anti-Semitic incidents committed across the nation during 1990 was the highest total ever reported in the 12 years that the Anti-Defamation League has compiled such reports and statistics. *Hate Crimes Statutes: A 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991) at p. 1. "Everyone who collects data reports a steady increase in hate crimes in the last year or two." Daniel Goleman, *As Bias Crimes Seem To Rise, Scientists Study Roots Of Racism*, New York Times, May 29, 1990, §C at 1 ("*Roots of Racism*").[3] Congress itself responded to this phenomenon when it enacted the Hate Crime Statistics Act of 1990, Pub. L. 101-275, 104 Stat. 140.

Not only is there an increase in the number of occurrences of hate crime, there is also a disturbing rise in the level of violence visited on its victims. Researchers have found that hate crime is often vicious; hate crime assaults are "far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than is true for other assaults." *Roots of Racism at 1. See also L.A. Hate Crimes.* Moreover, hate crime often "wound[s] the psyche more than the body and leave[s] a residue of painful distrust and fitful dreams." N.R. Kleinfield, *Bias Crimes Hold Steady, But Leave Many Scars*, New York Times, January 27, 1992, §A at 1.

Hate crime harms more than just the individual victim. It is directed at all members of a victim's group; such crime often provokes counterattacks. Judie Glave, *Hate Crime Against Children Sparks Concern In A Hard Town*, The

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[3] *See also*, Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270, 1270 (1988) (citing sources that found "an alarming trend of increased racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country.") Note, *Bias Crimes: Unconscious Racism In The Prosecution Of "Racially Motivated Violence"*, 99 Yale L.J. 845, 846 (1990); Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement And Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 103 (1984).

Associated Press, January 10, 1992, Domestic News Section. For this reason, hate crime may set in motion a series of events that ultimately escalates into mob violence. *See* Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 Stanford Law and Policy Review 165 (Winter 1992-93). Plainly, crime motivated by prejudice has an impact on the community far more severe than that resulting from similar acts committed without discriminatory selection as their impetus. As the American Bar Association Section of Criminal Justice reported:

> [C]rimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.* The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

Peter Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, Criminal Justice, Summer 1988, at 19, 20 (emphasis in original). The Oregon Supreme Court correctly relied on a similar rationale in upholding its state's hate crime penalty enhancement law:

> Such crimes — because they are directed not only toward the victim, but, in essence, toward an entire group of which the victim is perceived to be a member — invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs. Those are harms that the legislature is entitled to proscribe and penalize by criminal law.

State v. Plowman, 314 Or. 157, 838 P.2d 558, 564 (1992).

There is another well-recognized, destructive effect of hate crime. As early as the Reconstruction period, Congress observed that the commission of crime against persons because of their race deprived those persons of the full measure of their rights of citizenship, particularly where the crime was in the nature of intimidation, harassment, and assault. *See* S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (Report of C. Schurz); *United States v. Price*, 383 U.S. 787 (1966) (recounting remarks of Sen. Pool of North Carolina on sponsoring portions of the Enforcement Act of 1870). This is no less true today. See *Levin, supra.*

In the face of this history and evidence, Wisconsin and other states, in addition to the myriad of civil antidiscrimination statutes, have enacted or considered enacting criminal laws regulating crime in which the victim was selected because of his or her race, ethnicity, religion, or other discriminatory distinction. These laws include laws providing a penalty enhancement for the commission of discriminatory crime. The purpose of these statutes is to prevent this violent form of discrimination and its invidious effects on the citizenry.

B. The Decision In *R.A.V. v. City of St. Paul* Confirms That The States Have A Compelling Interest In Regulating Hate Crime.

The governmental interest in preventing deprivation of civil rights because of hate crime is compelling. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent . . . ").

This Court recently reaffirmed that the states' interest is compelling. *R.A.V. v. City of St. Paul*, 505 U.S. ____ , 112 S.Ct. 2538 (1992). While striking down the infirm St. Paul ordinance, this Court nevertheless confirmed that government has a compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members

to live in peace where they wish." *R.A.V.*, 505 U.S. at ____, 112 S.Ct. at 2549. This view was reinforced by Justice White in concurrence:

> [T]he city's judgment that harms based on race, color, creed, religion or gender are more pressing public concerns than the harms caused by other fighting words . . . is plainly reasonable. Indeed, as the majority concedes, the interest is compelling.

R.A.V., 505 U.S. at ____, 112 S.Ct. at 2556 (White, J., concurring in the judgment). The discrimination caused by hate crime imposes terrible costs on individual victims and on society as a whole. States clearly have a compelling interest in fighting these devastating effects.

II. STATES CAN SERVE THE COMPELLING INTEREST OF PREVENTING HATE CRIME THROUGH ANTIDISCRIMINATION STATUTES.

A. This Court Has Always Recognized The Right Of Government To Prevent Invidious Discrimination.

Since the days of Reconstruction, Congress has enacted antidiscrimination statutes to protect citizens' rights.[4] In the civil context, 42 U.S.C. §§1983, 1985, and 2000e make actionable various acts taken against a person because of

[4] The events that led to the enactment of the Reconstruction civil rights laws are remarkably similar to those that impelled the states to adopt statutes such as the one at issue in this case. *See* Stampp, *The Era of Reconstruction 1865-1877* (1965); *Jones v. Alfred M. Mayer Co.*, 392 U.S. 409 (1968). Senator Pool of North Carolina, sponsoring portions of the Enforcement Act of 1870, stated the need for such legislation:

> We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purpose, of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to unless the

his or her race or other discriminatory distinction. Indeed, class animus is an essential element of those statutory torts:

> The constitutional shoals that would lie in the path of interpreting 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Griffen v. Breckenridge, 403 U.S. 88, 102 (1971).

Most recently, in *Bray v. Alexandria Women's Health Clinic*, ____ U.S. ____, 61 U.S.L.W. 4080 (1993), this Court held that §1985(3) could not be invoked to prevent abortion opponents from blockading the entrance to an abortion clinic. Significantly, the Court reaffirmed that the animus element "demand[s] . . . at least a purpose that focuses upon" a person of a protected class "*by reason of*" their inclusion in that class. 61 U.S.L.W. at 4081-82 (emphasis in original).

Bray is the most recent of a long and consistent line of decisions that has held that discriminatory animus against protected classes is an essential and appropriate element of many antidiscrimination laws. Although this Court has debated at times the reach of the federal antidiscrimination statutes, it has never questioned Congress' power to protect persons from discrimination on the basis of race or other

[4] ***Footnote 4 cont.***
Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

Price, 383 U.S. at 809 (appendix) (quoting from Cong. Globe, 41st Cong., 2nd Sess., pp. 3611-3613).

characteristic. *See, e.g., United States v. Williams*, 341 U.S. 70, 72 (1951); *Jones, supra; Griffen, supra.*

Nor has the power to combat the effects of discrimination been limited to Congress. There are literally thousands of state antidiscrimination laws, both civil and criminal. *See, e.g.*, Ohio Revised Code §4112.02, prohibiting a host of unlawful discriminatory practices — civil, and Ohio Revised Code §2927.03, penalizing interference with fair housing rights - criminal. These statutes are an attempt by the states to be an equal partner with Congress in the protection of their citizens' civil rights. In addition to "hate crime" statutes, like the Wisconsin statute at issue, several of the Amici States have special tort statutes that allow recovery of compensatory and punitive damages for victims of hate violence. *See, e.g.*, Ohio Revised Code §2307.70; Va. Code Ann. §8.01-42. It has never been doubted that the states can regulate the effects of discrimination. Indeed, the Court has often recognized that states may provide greater protections for their citizens than those directly required by federal law. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 273 (1987) (state statute providing greater protection against pregnancy discrimination upheld, since statute not preempted by Title VII).

These statutes, prohibiting invidious discrimination because of race or other identifying characteristic, have never been held to be proscribed by the protections of the First Amendment. *Roberts*, 468 U.S. at 628 ("[A]cts of invidious discrimination . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, are entitled to no constitutional protection."); *Hishon v. King & Spalding*, 467 U.S. 69, 78(1984) ("[I]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protection".); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (" '[T]he constitution places no value on discrimination' . . . and while '[i]nvidious private

discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.' ").

R.A.V. affirms that the First Amendment presents no barrier to legislation protecting citizens from discrimination. The opinion recognized that:

> a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example sexual derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. §2000e-2; 29 CFR §1604.11 (1991). See also 18 U.S.C. §242, 42 U.S.C. §§1981, 1982. Where government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 505 U.S. at ____ , 112 S.Ct. at 2546-7.

B. The Principle That Unlawful Intent To Discriminate May Be Regulated Applies To Criminal As Well As Civil Statutes.

The First Amendment does not bar the government from imposing criminal sanctions for discriminatory activities undertaken by reason of the status of the victim. This Court in *R.A.V.* made a specific approving reference to 18 U.S.C. §242 as a regulation which is permissible under the First Amendment. 505 U.S. ____ , 112 S.Ct. at 2546.

18 U.S.C. §242 makes it a crime to deprive a person of his or her rights by reason of race or color.[5] *See United*

[5] Section 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State,

States v. White, 788 F.2d 390 (6th Cir. 1986) (firebombing of a victim's house, because the victim had been selected "by reason of race," violates statute). The goal of §20, the predecessor of §242, was "to protect all persons in the United States in their civil rights and furnish the means of their vindication." Cong. Globe, 39th Cong. 1st Sess. p 211. (remarks of Senator Trumbull, Chairman of the Senate Judiciary Committee). *Screws v. United States*, 325 U.S. 71, 98 (1945). (The "great purpose [of §242 is] the protection of the individual in his civil liberties".).

Other federal criminal statutes also prohibit the commission of certain acts on the basis of race or other discriminatory distinction. 18 U.S.C. §243 precludes the exclusion of jurors on account of race or color; 18 U.S.C. §245 prohibits a variety of deprivations involving voting, and public accommodations on the basis of race, color, religion, or national origin. 18 U.S.C. §247 prohibits the "obstruction of persons on the basis of free exercise of religion" and 18 U.S.C. §1091 prohibits "genocide" - the most terrible example of selecting members of a group as victims for commission of crime.

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[5] ***Footnote 5 cont.***

Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, *on account of such inhabitant being an alien, or by reason of his color, or race*, than are prescribed for the punishment of citizens . . .

Although the Court in *United States v. Classic*, 313 U.S. 299, 326 (1941) noted that the specific reference to "by reason of his color or race" is limited to "different punishments, pains, or penalties," it is also clear that the more general "deprivation of any rights, privileges, or immunities secured or protected by the Constitution" includes deprivation by reason of race or color. As illustrated by Justice Rutledge's concurrence in *Screws v. United States*, 325 U.S. at 123, n. 20, and held in later cases, the more general language of the first sentence of 18 U.S.C. §242 is intended to encompass more rights than the right not to be discriminated against on the basis of race or color, but certainly includes that right as well. *See Williams v. United States*, 341 U.S. 97 (1950); *United States v. Guest*, 383 U.S. 745 (1966); *Price, supra*.

As with civil antidiscrimination laws, the courts have never questioned the ability of Congress or the states to criminalize conduct committed because of the race or other discriminatory distinction of the victim. Indeed, the failure of the government to allege in an indictment and prove that the acts of the defendant were motivated by racial discrimination has been deemed sufficient reason to dismiss a criminal indictment for a violation of §242. *Guest, supra. See also Screws*, 325 U.S. at 106. ("It could hardly be doubted that they who 'under color of any law, statute, ordinance, regulation, or custom' act with . . . evil motive violate §20").

III. THE WISCONSIN STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT REGULATES CONDUCT, NOT SPEECH.

A. As With Other Discrimination Laws, The Wisconsin Legislation Targets The Conduct Of Selecting A Victim Who Belongs To A Protected Group For Harm.

These state statutes employ similar language to that used by §242 to link the commission of an act to the intent to select a member of a particular group to be the victim of the act. *Compare* 18 U.S.C. §242 (using phrase "by reason of") *with* Wisc. Stat. §939.645 (using the term "because of"). Just as Congress has done, the states have sought to address the problem of the denial of civil liberties on the basis of race or other discriminatory distinction by separately penalizing such conduct.

A hate crime statute like Wisconsin's is an antidiscrimination statute. Like other antidiscrimination statutes, these statutes forbid discriminatory conduct against victims because of their status. The discriminatory conduct addressed in each is the selection of members of those groups for treatment, or more often, mistreatment, on the basis of their status. Penalty enhancement statutes like Wisconsin's target conduct, not speech, and therefore do not run afoul of the First Amendment.

B. Inclusion Of The Element Of Intent To Discriminate Does Not Render The Wisconsin Statute A Direct Regulation Of Speech.

Wisconsin's statute, like other antidiscrimination laws, does not forbid anyone from speaking or thinking anything, no matter how obnoxious or undesirable the speech or thought may be. Rather, the statute addresses the compelling state interest in remedying invidious acts of discrimination by condemning the selection of certain persons for criminal harm because of their status.

Judge Bablitch, who dissented from the decision below, expressed this concept well:

> [The Wisconsin statute] is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection but rather anytime the choice of a victim from a protected class is shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807, 824 (1992). In this, the law is no different from countless federal antidiscrimination statutes, which turn on "selection" of the victim. *Mitchell*, 485 N.W.2d at 821 (Bablitch, J., dissenting). When a person acts upon thought or speech to the detriment of others, he may not lay claim to the protection of the First Amendment. "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Nor does it protect against violence by reason of discriminatory distinction. As this Court held in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), there is not ". . . an apparently limitless variety of conduct [that] can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.".

The opinion of the Wisconsin Supreme Court ignored this fundamental point when it concluded that the statute punished speech or thought. The statute is directed at conduct and "those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden". *Barnes v. Glen Theatre, Inc.*, 501 U.S. ____ , 111 S.Ct. 2456, 2468 (1991) (Scalia, J., concurring). The inclusion of the element of intentional selection in these statutes does not somehow convert the law from one punishing discriminatory activity to one punishing thought. Rather, it merely reflects an entirely appropriate legislative judgment that the harm occasioned by this form of criminal conduct merits more substantial sanction.

C. The Court's Decision In *R.A.V.* Does Not Require Invalidation Of A Statute Aimed At Conduct Rather Than Speech.

This Court's decision in *R.A.V.* does not require invalidation of a statute, like the Wisconsin law, aimed at conduct, not speech. In contrast to the decision of the court below, other state courts have recognized the fundamental difference between these statutes and the St. Paul ordinance. *Plowman, supra; Dobbins v. State of Florida*, Case No. 91-1953 (Fla. 5th D.Ct. September 25, 1992), 1992 Fla. App. LEXIS 10062.

The St. Paul ordinance in *R.A.V.* was flawed because it was directed at the content of speech, rather than discriminatory conduct. The Wisconsin statute, on the other hand:

> punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them.

Mitchell, 485 N.W.2d at 820 (Bablitch, J., dissenting). As *R.A.V.* explained, antidiscrimination statutes such as 18 U.S.C. §242, which prohibit the intentional selection of a victim of crime

by reason of status, proscribe conduct, not the message expressed. *R.A.V.*, 505 U.S. at ____ , 112 S.Ct. at 2547.

Because the Wisconsin statute is directed at conduct, not speech, First Amendment cases involving content-discrimination among classes of speech are inapplicable. But even if the statute invokes content-discrimination, it is a permissible regulation because it does not target conduct for the purpose of stifling expressive content. Thus, the activity governed by the Wisconsin statute is not shielded from regulation merely because an offender might claim to be expressing a discriminatory idea or philosophy through it. *R.A.V.*, 505 U.S. at ____ , 112 S.Ct. at 2546.[6] Any penalty imposed upon a discriminatory idea or philosophy is merely incidental to the legitimate regulation of conduct:

> As long as . . . discriminatory behavior . . . is being regulated, the First Amendment is not offended, for . . . the penalty exacted on speech in such cases is incidental to the governmental purpose of regulating the purely non-expressive component of the conduct.

Statement of Rodney A. Smolla, Arthur B. Hanson, Professor of Law and Director of the Institute of the Bill of Rights at the College of William and Mary, before the Subcommittee on Crime and Criminal Justice of the U.S. House of Representatives regarding H.B. 4797,[7] July 29, 1992, at 38-39.

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[6] The Wisconsin statute would also fall into other exceptions to application of the First Amendment. Because the regulation is focused on conduct directed at certain persons or groups, "there is no realistic possibility that official suppression of ideas is afoot". *R.A.V.*, 505 U.S. at ____ 112 S.Ct. at 2547. Moreover, racial or religious crimes have "special force" when applied to the victim. "[S]uch a reason [the threat of harm] having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class". *R.A.V.*, 505 U.S. at ____ 112 S.Ct. at 2546. *See also Watts v. United States*, 394 U.S. 705 (1969).

[7] Bill proposing "The Hate Crimes Sentencing Enhancement Act of 1992", H.B. 4797, 102nd Cong., 2nd Sess. (1992).

Legislation directed at non-expressive elements of conduct has repeatedly been upheld in the face of First Amendment challenge. *O'Brien, supra* (regulation of the draft); *Watts, supra* (threats against the president); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (closure of adult book store as nuisance); *Barnes, supra* (nude dancing). In *O'Brien*, this Court established a four-part test for assessing the constitutionality of conduct that may constitute symbolic speech. The test is whether the regulation is within the power of government to enact, whether the regulation furthers an important or substantial governmental interest, whether the regulation is aimed at the suppression of free expression, and whether the regulation imposes the least restrictions necessary to further that interest. *O'Brien*, 391 U.S. at 377.

Each element of the *O'Brien* test is satisfied by the Wisconsin statute. First, it is indisputedly within the power of state government to regulate and prohibit criminal conduct. Even while contending that the means chosen in this particular case were inappropriate, the majority in the court below never doubted the authority of the State to proscribe the conduct herein. *Mitchell*, 485 N.W.2d at 816.

Second, the states have a judicially acknowledged compelling interest in addressing invidious discrimination against their citizens. *Roberts, supra.* Here, in particular, that discrimination causes substantial harm to individuals, such as the deprivation of their civil rights. It also causes harm to society as a whole.

Third, the interest of a state in regulating this discrimination has no relationship to the suppression of free expression, for a state has a legitimate interest in preserving the civil rights of its citizens apart from and unrelated to any interest in suppressing the free speech rights of other of its citizens. *Roberts*, 468 U.S. at 628 ([Government may regulate acts of invidious discrimination] "wholly apart from the point of view such conduct may transmit.") *See also Finn, supra.* Wisconsin has chosen a method with its statute that does not prohibit speech or thought, only criminal action.

Fourth, the reach of the statute is no greater than is necessary to achieve its end. Like other antidiscrimination statutes, the Wisconsin statute is aimed exclusively at the intentional selection of victims because of their race or other status — not at the abstract thought or speech of the offender. Indeed, the "tight nexus between the selection of the victim and the underlying crime" demonstrates that the statute is properly measured. *Mitchell*, 485 N.W.2d at 189 (Abrahamson, J., dissenting). Even in the context of the direct regulation of speech, this Court has recognized that a strictly focused regulation can survive review. *See Burson v. Freeman*, 504 U.S. ___ , 112 S.Ct. 1846 (1992) (plurality opinion) (anti-electioneering statute upheld against First Amendment challenge where the restriction was logically connected with the state's interest in preventing voter intimidation and fraud).

IV. THE ANALYSIS OF THE WISCONSIN SUPREME COURT IS FLAWED BECAUSE THE WISCONSIN STATUTE DOES NOT SUPPRESS ABSTRACT THOUGHT.

A. The Wisconsin Statute Does Not Require Proof Of Motive In A Manner That Differs In Degree Or Kind From Other Antidiscrimination Laws.

The lower court misapprehended the focus of the Wisconsin statute. The statute is violated if a predicate offense is committed and if the victim is selected because of his or her status. Like other antidiscrimination laws, it makes no difference whether the perpetrator felt bias, prejudice, or something altogether different toward the victim. Moreover, the fact that the Wisconsin statute requires a showing of discrimination is no more offensive to the Constitution than is the same requirement contained in 42 U.S.C. §1985(3). *See Bray*, ___ U.S. ___ , 61 U.S.L.W. at 4082. ("Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group") (citations omitted).

The lower court attempted to distinguish the Wisconsin statute from other antidiscrimination laws which it characterized as being aimed at "objective manifestations of discrimination," such as a failure to hire a person, rather than at motive. The court's distinction is not persuasive, particularly since the Wisconsin statute and federal antidiscrimination statutes contain identical elements. The basis for all antidiscrimination laws is the "selection" of a person based on status. In many instances, an act (e.g., the termination of employment) is not unlawful in and of itself. It becomes so only because a person has been intentionally selected for firing "by reason of" his or her race, ethnicity or religion. These laws reflect a legislative judgment that such selection deprives persons of their civil rights. A law that enhances penalties when a crime is committed in which the victim was selected on the basis of his or her race, ethnicity, or religion entails a similar legislative judgment and should similarly be upheld.

To accept the analysis of the court below, it is ultimately necessary to confront the question posed by Judge Bablitch in his dissent - why is the element of intentional selection on the basis of race or other status constitutionally appropriate in a statute which makes otherwise legal activity illegal, but violative of the First Amendment when relied on to enhance a penalty for conduct the state can concededly punish in the first instance? *Mitchell*, 485 N.W.2d at 820.

The lower court, however, avoided the question. Rather, to explain its result, it created an "objective act" distinction between admittedly valid antidiscrimination laws and the Wisconsin statute. This distinction is premised upon the lower court's construal of the Wisconsin statute as punishing the "subjective motivations" of the actor. In contrast, the court below discerned that other antidiscrimination laws prohibit only the object of the discrimination e.g., termination of employment. This mode of analysis is fallacious. An objective act (termination of employment by breach of contract) may be wrongful in and of itself, but becomes "discriminatory" solely because of the subjective motivation of the actor.

Moreover, it is simply incorrect to say that the Wisconsin penalty enhancement statute does not punish an objective manifestation of discrimination. Just as is true of 18 U.S.C. §242, the Wisconsin statute punishes the objective commission of a crime. If the *Mitchell* majority is correct that the discriminatory motive requirement of the Wisconsin statute suppresses abstract thought, it offers no justification why the identical requirement under antidiscrimination statutes does not also suppress abstract thought.

B. The Constitution Does Not Prohibit Consideration Of A Perpetrator's Motive When It Is Material To The Commission Of A Crime.

The lower court's analysis assumes without basis that punishing a motive to commit a crime inherently involves punishing protected speech and the abstract thought behind that motive. Indeed, the court went so far as to accept one commentator's assertion that "motive cannot be a criminal offense or an element of an offense". *Mitchell*, 485 N.W.2d at 813 n.11 (quoting Susan Gellman, *Sticks And Stones Can Put You In Jail But Can Words Increase Your Sentence?, Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333, 364-5 (1991)). The court below engaged in a discussion of the difference between motive and intent as generally used in the criminal law. However, the court below erred in focusing on "labels" rather than the fundamental question — whether the statute is aimed at conduct, not speech or thought.

It is simply wrong that motive to commit a crime can never be an element of an offense. *See, e.g., Screws*, 325 U.S. at 101 ("An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.") A motive to commit a crime may be punished if the motive triggers the conduct that the legislature has an interest in preventing.

Thus, in *Dawson v. Delaware*, 503 U.S. ___ , 112 S. Ct. 1093 (1992) and *Barclay v. Florida*, 463 U.S. 939 (1983)

(plurality), this Court determined that a general motive may be punished if it is material to the conduct proscribed by the legislature. In *Barclay*, the lower court expressly considered and based its imposition of the death sentence on the defendant's racial motive for committing the murder. This Court rejected the defendant's claim that it was constitutionally impermissible for a state court judge to consider the racial animus that motivated the crime in determining the proper sentence for that crime:

> The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.

463 U.S. at 949.

The defendant in *Barclay* had selected a victim for death solely because of the victim's race in order to start a "race war". This Court found that Barclay's motive was material to the conduct proscribed by the statute. The Court also found that consideration of this motive was within the discretion of the sentencing judge and was not "arbitrary and capricious." *Barclay*, 463 U.S. at 950. Conversely, in *Dawson*, the Court found that consideration in sentencing of the defendant's membership in a white power group violated Dawson's constitutional rights because his membership *did not motivate the commission of the crime.* Dawson's motive was completely irrelevant to the harm which the statute was designed to prevent, and thus could not be considered.

The lesson of *Barclay* and *Dawson*, that consideration of a class based motive may be considered when determining an appropriate sentence, supports the constitutionality of the Wisconsin statute. The Wisconsin legislature, like the sentencing judge in *Barclay*, has been invested with the authority to make "important judgments" with respect to punishment. *Barclay*, 463 U.S. at 950. While the sentencing judge makes those judgments within a penalty range, the

legislature prescribes the penalty range in the first instance.[8] Since in a hate crime statute, as in other antidiscrimination laws, the defendant's animus is material to the conduct proscribed by the statute, *see Roberts, supra*, the legislature may take this factor into account in setting the penalty range.

The court below dismissed any analogy to *Dawson*, holding that, while it may be permissible for a judge to consider motive in sentencing for a crime, a legislature cannot separately punish the "evil motive" for that crime. *Mitchell*, 485 N.W.2d at 815 n.17. That argument, however, is premised on the erroneous predicate that motive to commit an offense described by the legislature can never be punished. If, as the lower court suggested, a motive to commit a crime must be equated with abstract thought, then it must also be impermissible for a sentencing judge to consider "motive" as a basis for increasing the punishment of a crime. This Court, in *Barclay* and *Dawson*, counsels otherwise.

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[8] The U.S. Congress performed this function by delegating some of its sentencing responsibility to the United States Sentencing Commission pursuant to 28 U.S.C. §994. Pursuant to this authority, the Commission promulgated Section H, Federal Sentencing Guidelines, which adds two levels to a penalty for a basic predicate offense to "reflect the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights". Introductory Comments, Part H, Section 1, Civil Rights. The enhanced penalties of Section H are associated with federal criminal statutes involving racial, religious, or ethnic crimes such as 18 U.S.C. §§242, 245, and 247.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 1 1993
OFFICE OF THE CLERK

NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

vs.

TODD MITCHELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OHIO, FLORIDA, MISSOURI AND NEW YORK STATE ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. DOES THE GOVERNMENT HAVE THE POWER TO REGULATE THE THOUGHT OF THE INDIVIDUAL?

II. IS A SENTENCE ENHANCEMENT STATUTE WHICH REQUIRES PROOF OF BOTH AN ILLEGAL ACT AND PRIVILEGED THOUGHT OR SPEECH UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST AMENDMENT AND, THEREFORE, VOID?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OHIO, FLORIDA, MISSOURI AND NEW YORK STATE ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Ohio, Florida, Missouri and New York State Associations of Criminal Defense Lawyers are statewide organizations of attorneys practicing primarily in the field of criminal defense law. The organizations are affiliated with the NACDL and have been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law. The membership of these organizations includes both private practitioners and public defenders many of whom have served as prosecutors.

Amici believe that the precious constitutional rights of the people must be jealously guarded against encroachment by the government, for a right once lost is never to be regained. The case at bar is an extraordinary one. The state seeks dominion over thought itself. The people have not delegated this authority to the state. It is simply not part of our social compact with government. This remains true even though the majority finds the particular thoughts at issue politically incorrect and unworthy of protection.

The parties have consented to the filing of this brief of *Amici Curiae* by letters filed with the Clerk.

SUMMARY OF THE ARGUMENT

The people have not granted government the authority to regulate or control thought. Thought, the core value protected by the First Amendment's freedom of speech clause, is absolutely protected and any attempt to regulate it is void. This is true even where the proposed regulation is aimed at the thoughts of a criminal.

Wisconsin's sentence enhancement statute attempts to evade this logic by use of the "intentional selection" language. The sentence is not enhanced because of the offender's thoughts, so the argument goes, but rather it is enhanced because the offender "intentionally selects" the victim because of the victim's race. However, all victims are selected intentionally. Criminal law traditionally defines several types of *mens rea*. The prohibited conduct must be purposeful, knowing, reckless or criminally negligent in order to constitute a crime. But this is insufficient under the Wisconsin statute to trigger sentence enhancement. In addition, the state must prove the thought or motive behind the intent. Thus, protected thought is singled out for punishment at a higher level than the same criminal act and intent without proof of thought or motive. This the government may not do.

Although this argument may be framed in traditional First Amendment language of overbreadth or infringement upon protected speech, it is in its simplest form more fundamental than that. The state of Wisconsin has attempted to usurp a power not granted it by its social compact with the people. To the extent that this fundamental truth manifests itself in the federal constitution through the First Amendment, the law is void as an abridgement of the freedom of speech.

ARGUMENT:

THE GOVERNMENT HAS NO POWER TO REGULATE THOUGHT. WHERE A SENTENCE ENHANCEMENT STATUTE REQUIRES PROOF OF BOTH AN ILLEGAL ACT AND PRIVILEGED THOUGHT OR SPEECH IT IS UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST AMENDMENT AND, THEREFORE, VOID.

> *"Every opinion may be tolerated where reason is left free to combat it."*

Thomas Jefferson, First Inaugural Address, March 4, 1801.

The substantial constitutional question in this case is whether government may regulate thought. The Wisconsin penalty enhancement statute (Wis. Stat. § 939.645) makes relevant the thoughts of the individual to the extent that they occur and are somehow related to the predicate crime. The phrase "intentionally selects the person . . . because of the race, (etc.) of that person" suggests a cause and effect relationship between the thought and the predicate offense.

Proof of the defendant's conduct alone is insufficient to trigger the sentence enhancement statute. Therefore, this statute makes thought with a particular content an element of the criminal offense.[1] The conduct associated with the offense is already prohibited. This is not contested. The dispute is whether it is constitutional to prohibit conduct plus thought. It is not.

The State of Wisconsin has a legitimate interest in protecting the health, safety, and welfare of the people, but it has no

[1] Of course, all crimes (with the exception of strict liability offenses) contain a mental element. But the traditional *mens rea*, such as purposeful or intentional action, does not require proof of the content of thought. The Wisconsin penalty enhancement statute makes the content of the thought an element of the statute, thereby discriminating between various motivations.

interest in controlling their thoughts. This Court has long held that freedom of thought enjoys the same constitutional guarantee as freedom of conscience, and that in neither case do the States enjoy the power to regulate:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust in government to separate the true from the false for us.

Thomas v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). *See also*, *State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Myer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The words of Thomas Jefferson give voice to this bedrock principle. It is a principle which remains valid even when the particular thought is offensive and not "politically correct". *See Terminiello* v. *Chicago*, 337 U.S. 1, 4-5 (1949). Common beliefs bind the majority of our society together. But our constitutional democracy is designed to protect the rights of a minority, indeed even a single individual, against majoritarian oppression in certain fundamental areas. The most fundamental protection is the inherent right of free and unfettered thought.

The statute reads in relevant part:

> If a person does all of the following, the penalties for the underlying crime are increased . . . (a) commits a crime . . . (b) Intentionally selects the person against whom the crime under para. (a) is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . .

Wis. Stat. § 939.645 (1989-90).

Wisconsin had already passed laws which govern every aspect of the conduct involved in this case. Proof of one of these crimes is necessary for, but insufficient to invoke the additional penalties, provided by the statute. In addition to the conduct, the State of Wisconsin was required to prove that respondent held a thought with a particular content in his mind when the predicate offense was committed. It is proof of this second element which triggers the enhancement statute. Penalties for crimes committed while the defendant is possessed of an offending thought or belief is double that where the proof on this issue fails.[2] Where the proof does not fail, the statute specifically punishes the thought harbored by the defendant at the time of the offense.

A fair reading of this statute is that the selection of the victim of the offense must be motivated by or "because of" the victim's race, etc. The thoughts of the offender are the cause and the underlying crime is the effect. Both cause and effect are essential elements of this statute. Any other reading would create character evidence problems under Rule 404(B), Wisconsin Rules of Evidence.[3] However, this offends the First and Fourteenth Amendments to the United States Constitution because it invades the cognate right of the individual to think whatever he or she pleases. *See Aptheker* v. *The*

[2] It has been suggested that because this statute does not create a separate offense but simply serves to enhance the punishment of acts which are already illegal it does not offend the constitution. This is a matter of constitutional insignificance, however, as the sentence enhancer remains a legislative attempt to regulate or control thought. *See United States* v. *Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983) ("A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid"). *United States* v. *Bangret*, 645 F.2d 1297, 1305 (8th Cir. 1981) ("Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendant's sentences, because it would impair the rights of the defendants under the First Amendment [. . .].").

[3] Evidence of a defendant's bigotry, for example, is inadmissible to prove bad character and, therefore, action in conformity with bad character.

Secretary of State, 378 U.S. 500, 517 (1964) (Black, J., concurring). *See also Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

If the state can do this at all then it can do it at will. If bigotry can be singled out for higher punishment, then so can political party affiliation, culinary preference, or any other aspect of thought or belief. Petitioner and their *amici* fail to explain why these categories could not be appended to the "because of" portion of the statute immediately following "national origin or ancestry". Assume, by way of example, that the statute included artistic preference immediately after ancestry, and that the crime was committed against an impressionist painter. The state, put to its proof, would show that the defendant intentionally selected his victim because, being a realist he despised the impressionist school of art. Acting on his belief makes him guilty of the assault, but the belief itself doubles his punishment. Indeed, under the Wisconsin statute, he would be punished at the higher level even if he were mistaken about the victim's artistic preference.

However, the government has only such power as the people have conferred upon it. The people of the State of Wisconsin have never conferred the power of thought control upon the Wisconsin legislature. To the contrary, this right has been specifically reserved by the people. *See, e.g.*, Article I, Section 1 of the Wisconsin Constitution ("All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights, governments are instituted, deriving their just powers from the consent of the governed.") *See also* Amendments IX and X, United States Constituition. The state simply may not regulate an area wherein it has no interest.[4] Thought is not merely a cognate or penumbral right

[4] Petitioner has stated that "the State legislature has legitimate reasons for believing that many discrimination crimes deserve higher penalties." Petitioner's Brief at 9. Petitioner then continues, oxymoronically, "[t]he law

protected by the First Amendment. It is a right even more fundamental than speech or association. Although speech and association are given constitutional ink, they are merely the vehicles through which thought is transmitted.

The Wisconsin legislature has sought to penalize thought with a particular content. To this extent the case at bar is distinguishable from *R.A.V.* v. *City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. 2538 (1992). There is no question that conduct can be and already has been sanctioned. However the Constitution requires a cold neutrality from the legislature where it seeks to govern expressive conduct. *See Texas* v. *Johnson*, 491 U.S. 397, 406 (1989); *R.A.V., supra*, ___ U.S at ___, 112 S.Ct. at 2542. Each person and every group in society is entitled to the equal protection of the laws, no more and no less. When the Wisconsin legislature attempts to protect one group in society from the thoughts *in addition to* the conduct of another group, it violates this principle of neutrality. It does at once too much and too little.

It does too much when a precedent is set allowing criminal sanctions against thoughts which are unpopular under contemporary values. Values may change, but once the government has usurped a power from the people it never gives it back.

And it does too little. Criminal laws do not prevent crime. Criminal laws punish, but do not change behavior. The suggestion that this law is aimed at preventing or reducing racial, religious or ethnic violence is at best disingenuous. It

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does not violate the First Amendment because these reasons have nothing to do with punishing beliefs." Id. *Amici* for respondent respectfully disagree. The state has *no* legitimate reason for believing that discrimination crimes deserve higher penalties than the identical crime committed with some other motivation. The fact that a majority of the legislature disapprove of Mr. Mitchell's anger toward whites does not mean that the government can seek to extinguish such thoughts. The Wisconsin Legislature is entitled to express its outrage at those who commit racially motivated crimes, but not by punishing the thought. Simply put, government may not directly regulate the thoughts of the people in any manner.

will do no such thing. Not a single act of ethnic violence or racial intimidation will be thwarted. This law was enacted for political reasons. It allows legislators and prosecutors to posture before the public. Such laws fool the electorate into believing that politicians are addressing themselves to the underlying social problems which breed intolerance when, in fact, they are doing nothing at all.

Nor does it matter that the "interest" of the state is characterized as "compelling". This Court has struck down laws where the government's interest is arguably at its zenith, *e.g.*, criminal syndication statutes designed to protect the government against violent overthrow or revolution. The rationale of these decisions recommends itself here:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion of the people and that changes if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. *Oregon*, 299 U.S. 353, 365 (1937).

It has been suggested that the statute does not regulate thought or speech in an impermissible fashion[5] because the

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[5] Of course, the power of government to regulate speech is severely limited. Speech can be regulated where it is "brigaded with action" such as shouting fire in a crowded theater. See *Speiser* v. *Randall*, 357 U.S. 513, 536-37 (1958) (Douglas, J., concurring). But a prosecution for inducing a panic is based upon the conduct of the defendant and not the content of his thought. Applying this analogy to the case *sub judice*, the prosecution would be required to prove that the defendant shouted fire in the crowded theater because he hated the patrons of the theater (i.e. intentionally selected them because of their race, etc.). This crosses the line. Government may not directly regulate the content of an individual's thoughts even if the thought is "brigaded with action". *Texas* v. *Johnson*, *supra*.

sanction operates only in concert with the conduct embodied in the predicate offense. However, this argument is flawed. Where the criminal sanction is based on a mix, partially for what is thought or spoken and partially for what is illegally done, the conviction cannot stand. *See Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942); *Street* v. *New York*, 394 U.S. 576, 586-87 (1969). This Court has often noted that regulations based on the content of speech or expressive conduct is presumptively invalid. *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Board*, 502 U.S. ____, ____, 112 S.Ct. 501, 508, 116 L.Ed.2d 476, ____ (1991); *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n. of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

Street v. *New York*, *supra*, is instructive:

> [. . .] we conclude that the case is governed by the rule of *Stromberg*, and that appellant's conviction must be set aside if we find that it could have been based solely upon his words and that a conviction resting on such a basis would be unconstitutional [. . .]. Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act.

394 U.S., at 586-87 (emphasis added).

A conviction under the Wisconsin statute requires — by definition and design — proof of both an illegal act and privileged thought.[6] Protected speech is implicated as it will

[6] Moreover, the thought must be of a certain and particular content. Intentional selection of the victim because of the victim's race or religion is prohibited whereas intentional selection because of the victims politics, philosophy or taste in art is not.

be the most common form the state's evidence of the defendant's bigotry will take. The statute is patently unconstitutional because it attempts to convert otherwise constitutionally protected thought into an element of the enhancement law. The statute is overbroad *by design*.

It takes little imagination to foresee the harm that could come from allowing thought control so long as it is allied with "criminal conduct". One of the results of the so called war against crime has been the explosive growth in the reach of criminal law, particularly in the area of conspiracy. All that is required to prove a conspiracy is a criminal agreement to which the defendant is a party. One may well be held accountable even where he or she takes no other act in furtherance of the conspiracy. In such a case the defendant's "thought" would be "brigaded" only with the action of a co-conspirator. Furthermore, such an action may have occurred before the defendant even became part of the conspiracy. In fact, this could have occurred in the case at bar. The defendant clearly formed a conspiracy with the others in his gang to assault the victim. If one of the others had actually assaulted him a day later, Mr. Mitchell could have been charged, tried and convicted as a co-conspirator based upon his agreement to join in the criminal conspiracy standing alone.

Even if it were conceded that the state has a legitimate and compelling interest in controlling thought, a showing would be required that the means employed are the narrowest available. *R.A.V.*, *supra*, ____ U.S. at ____, 112 S.Ct. at 2549-50. In this case they are not. There is no evidence whatsoever that this statute will reduce ethnic or racial crime. It seems clear, though, that the statute can and will be used to enforce a conformity of thought. *Amici* question the wisdom of seeking social tranquility through thought control. Even if it works the cure may be worse than the affliction.

This is not the first time that state legislatures have attempted to regulate what the people think or believe. But the

power to regulate is the power to punish and this knowledge can chill the exercise of free speech. Wrote Justice William O. Douglas:

> One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The line drawn by the Court between the criminal act of being an "active Communist" and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. ***But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators.*** That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known. ***The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.*** The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theater. This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U.S. 513, 536-37, 78 S. Ct. 1332, 1346, 2 L. Ed. 2d 1460 (Douglass, J., concurring). They are indeed inseparable and a prosecution-can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of

> advocacy turns on the depth of the conviction; and ***government has no power to invade that sanctuary of belief and conscience.***

Brandenburg v. *Ohio*, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring) (emphasis added).

CONCLUSION

Judge Learned Hand wrote that the First Amendment, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

Only those among us of mean spirit will advocate racism and bigotry. But our system of government does not allow the state to invoke the police power to punish the thoughts and beliefs of any citizen, no matter how reprehensible. Nor may government single out thought of a particular content for punishment even when it is brigaged with criminal action. We must place our faith in our ability to grow and mature as a society. We must hope that the evolving standards of decency will, one day, lead to the extinction of abhorrent attitudes and undesirable beliefs. But this must be a nautral evolution. It can not be achieved through legislative fiat:

> Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 671 (1943) (Frankfurter, J., dissenting).

Conduct can be punished. It is. Thought may not. Yet this is what Wisconsin would do through § 939.651. In its attempt to punish bigoted thought Wisconsin has exceeded the power granted it by the people. In its attempt to usurp this power the Wisconsin legisiature has violated the social compact under which the people consent to be governed. Governmental cries of compeliing need and necessity are unmoving. We have heard such cries before. They have been evoked, for example, to justify internment of Japanese-Americans during the second World War — cries that this Court heeded to our collective shame as a constitutional democracy. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214 (1944). The same mistake should not be made here where the compelling necessity is simply to enforce that which is politically correct at the moment. The decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully Submitted,

/s/ _____

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NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

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On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE OF THE WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is a professional association of attorneys who devote a substantial portion of their practice to the defense of persons accused of crimes. The Association is committed not just to defending criminal cases, but to guaranteeing that the constitutional rights of even the most unpopular defendants are preserved.

Wisconsin v. Mitchell involves issues which are of fundamental importance to the members of WACDL and their clients. The lawyers of WACDL are those who will be most intimately involved with litigating future cases that depend on the Court's decision in Mitchell. We therefore respectfully submit this brief as amicus curiae to offer the Court the benefit of our views.

STATEMENT OF THE CASE

On the night of October 7, 1989, Todd Mitchell was standing with several other young black men and women outside an apartment complex in Kenosha, Wisconsin. Earlier that evening, some of the members of the group discussed the film,

"Mississippi Burning." In particular, they spoke about their reactions to a scene in which a black child was the victim of a racist beating. Mitchell then addressed the group, asking, "Do you all feel hyped up to move on some white people?" A few minutes later, Mitchell pointed to a white teenager walking across the street, and said, "There goes a white boy; go get him." The group then attacked the white youth, beat him severely, and stole his sneakers.

Mitchell was indicted and found guilty of aggravated battery and theft. He was also charged under a separate Wisconsin hate crimes penalty enhancement statute, which imposes increased punishment when a defendant:

> intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.

Wis. Stat. §939.645 (1989-90). As a result of the penalty enhancement law, Mitchell was sentenced to four years in prison, instead of the two years he would have received for aggravated battery.

SUMMARY OF ARGUMENT

Any time society is faced with the threat of violence, it is essential not just that we respond to the threat, but that we meet these perils in a manner consistent with our constitutional rights. Unfortunately, there have been instances where we have responded not with reasoned policy, but with panic and fear. The result was legislation that diminished the liberty of not just those who seemed to present the danger, but of us all.

Fear of violent foreign political philosophies led to criminal syndicalism laws that limited everyone's right to read, write and speak. See DeJonge v. Oregon, 299 U.S. 353 (1936); Fiske v. Kansas, 274 U.S. 380 (1926). The Republic ultimately survived these scares, but with no help from laws that abridged the First Amendment. With but a few years' historical perspective, these incidents of fearful, crisis-generated legislation are now recognized for what they truly are -- an embarrassment which we hope could not be repeated under present constitutional standards.

Today, as Petitioner so eloquently details, the United States faces a serious problem of bias-related violence. It is not

Mitchell's intention to belittle or minimize the importance of this issue. Hate crimes must be eliminated if we are ever to achieve the goal of a free and equal society. Yet this goal is not advanced by statutes which merely pile additional penalties on those who express a loathsome reason for committing acts which are already criminal. The right of all people to assert their opinions, regardless of how unpopular or odious, must be preserved -- even if this means sentencing a hate criminal under the same guidelines as one who committed the offense for a more acceptable motive.[1]

Todd Mitchell was properly convicted and punished for committing aggravated battery and theft. His conviction under Wis. Stat. §939.645 added two years to his sentence only because he had the temerity to express an improper motive for his crime. There can be no doubt that if he had simply kept his mouth shut, he could not have even been charged, let alone convicted, under the enhancement law. Indeed, the Wisconsin statute can only be used against those who give voice to their opinions. A criminal

[1] Among the traditional motives deemed more acceptable by the Wisconsin legislature are: avarice, lust, anger, envy, vanity, sloth and gluttony.

who maintains a respectful silence, regardless of how bigoted his motive, can never be convicted.

Enforcement of the Wisconsin law places an improper chill on the right of every person to express an opinion which may at a future time be considered evidence of bias. This chill affects not just criminals, but everyone who desires to make a statement. It falls particularly heavily on those who engage in radical political speech.

The penalty enhancer also permits the use of otherwise inadmissible, and highly prejudicial evidence at the trial of the substantive offense. This considerably increases the chance that a person will be convicted -- not necessarily of the bias law, but of the underlying crime.

The greatest danger to a free society comes not from its enemies, but from its well-meaning friends, who would solve democracy's problems by surrendering the freedom which is its greatest treasure. The Wisconsin hate crimes statute is a well-intentioned, but panicky attempt to solve a serious problem.

Unfortunately, it tries to do so in a way that will substantially and improperly chill the First Amendment rights of us all.

ARGUMENT

THE WISCONSIN PENALTY ENHANCEMENT STATUTE PUNISHES NOT ACTIONS, BUT THOUGHTS AND THE EXPRESSION OF THOSE THOUGHTS. MOREOVER, THE STATUTE IS OVERBROAD BECAUSE IT SWEEPS WITHIN ITS AMBIT A SUBSTANTIAL AMOUNT OF ACTIVITY PROTECTED BY THE FIRST AMENDMENT.

A. The Wisconsin Penalty Enhancement Statute Punishes Not Actions, but Thoughts and the Expression of Those Thoughts.

All parties and amici seem to agree that if the Wisconsin statute punishes speech or thought, as opposed to conduct, it must be declared unconstitutional even if it advances a societally desirable goal. Consequently, this case turns on the question of whether the stated motive for committing a crime is a criminal act itself, or is a separate and protected expression of the actor's thoughts.

It is noteworthy that the conduct with which Respondent was charged is already criminalized by several other Wisconsin

laws.[2] Mitchell was convicted under those laws and sentenced to years of imprisonment, independent of any enhancement provisions. It was only his motive -- an operation of his mind manifested by the exercise of his voice -- which allowed the state to impose extra punishment under the hate crimes statute.

Petitioner claims that the statute is necessary because crimes motivated by certain kinds of hatred present a more serious danger to society than crimes committed for other reasons. In support of this position, petitioner argues that bias-related crime is particularly evil because of the fear and distrust it engenders within and between racial, religious and ethnic groups. Petitioner's Brief at 25-27. Yet this bias-related pain is not caused by the criminal acts, or even by the selection of a victim. Rather, it results solely from the expression of the motive. For example, if a Christian walks up to a Jew and silently punches him in the nose, the victim may experience a particularized fear of his assailant, and a generalized fear of street crime. Yet he will not experience the

[2] Mitchell was concurrently found guilty of aggravated battery, party to a crime, Wis. Stat. §939.05 and 940.19(1m); also, theft, party to a crime, Wis. Stat. §943.20(1)(a) and (3)(d)2.

kind of bias-related fear at which the Wisconsin statute is aimed. It is only if the same attack is accompanied by some expression of anti-semitic opinion that the particular evils of bias crime come into play. Thus, the Wisconsin enhancement provision does not even attempt to punish one for the harm caused by a physical act. Rather, it targets only the harm caused by the expression of hurtful opinions. Such expression, however, is absolutely protected by the First Amendment, regardless of the pain or fear it may engender. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992).

That the Wisconsin statute is aimed at speech is further proven by the fact that it is impossible ever to secure a conviction unless the defendant makes a constitutionally protected expression of his bias. Petitioner asserts the purely theoretical claim that "one could violate this statute while remaining entirely mute." People v. Grupe, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988). Realistically, however, such a violation could never be proven. For example, if a Jew walks up to a Christian while silently thinking, "I hate all Gentiles, and because of that hatred I am selecting this one for a punch in the nose," he would theoretically

be violating the Wisconsin statute as soon as he delivered the punch. Of course, he could never be convicted under the hate crimes law because he never expressed his motive in a way that could be proven at trial. In fact, as long as he remained discrete, he probably could not even be charged under the enhancement law.

Thus, no one will ever have his or her sentence enhanced for merely acting on an unexpressed bias motive. That the victim and the accused come from different backgrounds is never in itself sufficient to prove bias. Punishment will only be increased for those who have the audacity to express their motive. Of course, every conceivable manner of such expression, whether by speech, association or assembly is protected by the First Amendment.

In a related civil context this Court noted that punishment cannot be imposed for protected expression even if it supplies the motive for a crime. In N.A.A.C.P. v. Claiborne Hardware Company, 458 U.S. 886, 918 (1982), this Court held that "[w]hile the State may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." The incident

underlying Claiborne was a boycott the N.A.A.C.P. organized against white merchants in Claiborne County, Mississippi in 1966. The merchants ultimately sued for damages sustained both as a result of the boycott and as a result of violent incidents committed by supporters of the boycott. The Court ruled that while violent acts could result in civil liability, the boycott itself was protected by the First Amendment even if it was the sole motive for the violence. Those who organized or supported it could therefore not be sued for damages.

Thus, the Court in Claiborne drew a line between damage resulting from violent acts and damage resulting from protected expression which might form the motivation for the violence. The former can be punished, the latter cannot.

The facts of Claiborne are analogous to those of the case at bar. Like the boycott, Mitchell's statements were protected by the First Amendment. Like the boycott-related violence, the attack in Kenosha was motivated by Mitchell's bigoted pronouncements. It therefore follows logically, that as this Court held in Claiborne,

the violence committed by Mitchell can be punished, but the protected expression of his motive cannot.

Petitioner has also claimed that this Court's recent decision in Dawson v. Delaware, 112 S. Ct. 1093 (1992) provides support for the constitutionality of the Wisconsin penalty enhancer. Dawson, however, stands only for the proposition that a defendant's statements, even if protected by the First Amendment, may be admitted into evidence at a criminal trial if they reflect a motive relevant to establishing his guilt. Dawson does not, however, provide any support for the notion that the statements or motive can themselves be punished as a separate crime. Therefore, if applied to Mitchell, all Dawson means is that Mitchell's statements could have been introduced at his trial for aggravated battery, if they were sufficiently relevant to proving he committed that crime. They cannot, however, be made into a separate crime for which he can be punished beyond his sentence for the battery.

B. The Wisconsin Penalty Enhancement Statute is Overbroad, Because It Sweeps Within Its Ambit a Substantial Amount of Activity Protected by the First Amendment.

A statute will be declared overbroad when it is not aimed "with sufficient specificity at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The Wisconsin penalty enhancement statute is overbroad because it "criminalizes a substantial amount of expression that -- however repugnant -- is shielded by the First Amendment," and thereby has an impermissible chilling effect on the exercise of free speech. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538, 2559 (White, J., concurring) (1992).

Petitioner has glibly asserted that there is no chill on free speech, because all a person must do to protect his or her First Amendment rights is to refrain from committing an underlying crime. Petitioner's Brief at 41, 44. The difficulty with this view is that the statute requires no temporal nexus between a criminal act and the evidence introduced to prove a bias-related motive. It is perfectly permissible for the state to introduce evidence of past statements, writings, memberships, associations or subscriptions,

on the theory that they are still probative of the defendant's present motive. The chill may therefore occur not when the crime is committed, but months or years earlier, when the speaker had no intention of engaging in criminal behavior, but was merely expressing odious or unpopular views.

Because of this "delayed chill," the Wisconsin statute will have the most serious impact on that speech which is most important to protect. Political activists of all stripes are the people most likely to engage in hyperbolic, overstated language directed at other groups or opponents. They are also among the most likely people to be aware of new laws which might result in future punishment for their present views.

Although the overbreadth doctrine is "strong medicine," to be used "sparingly," Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973), the inhibition of political speech presents the most compelling case for invalidating a statute. See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Mills v. Alabama, 384 U.S. 214, 218 (1966); Roth v. United States, 354 U.S. 476, 484 (1956).

The Wisconsin statute is not merely overbroad because it threatens speakers with increased sentences. It also substantially chills free speech because it significantly and improperly increases the possibility that one will be convicted of the underlying crime.

As this court noted in Dawson, evidence of a defendant's prior statements and associations may be admissible if they are relevant to proving an element of the crime. But even if a past statement is relevant, its probative value must outweigh the prejudicial impact on the trier of fact. Under the Wisconsin penalty enhancement law, however, a defendant's past statements will always be admissible because motive is always an element of the crime. Moreover, despite Wisconsin's evidence code, which permits the use of a general probative/prejudical test, there can be no real balancing between prejudicial and probative values; the more prejudicial a statement is, the more relevant it is to establishing the sole element of the enhancement statute. Wis. Stat. §904.03.

For example, in United States v. Millen, 594 F.2d 1085, 1088 (6th Cir. 1979), the defendant was a doctor accused of

murdering someone with a lethal injection of demerol. During the trial, the prosecution, supposedly to establish a motive for the crime, was permitted to introduce evidence that the defendant had been homosexually involved with the victim. In reversing, the Sixth Circuit ruled that "the prejudicial aspect of the answer given far outweighed any obvious or apparent probative value."

Assume, however, that Millen had also been charged under the Wisconsin law with selecting his victim on the basis of sexual orientation. The statement's prejudicial impact on the jury's consideration of the underlying crime would be the same. Nonetheless, it would now have to be admitted into evidence because its very outrageousness establishes the element of bias for the enhancement law.

Thus, the hate crimes statute guarantees that if a person is ever charged with a crime, the chance of conviction is substantially increased because otherwise inadmissible speech is transformed into proper evidence.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 4 1992
OFFICE OF THE CLERK

CASE NO. 92-515
CASE NO. 92-568

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

STATE OF OHIO,

Petitioner,

v.

DAVID WYANT, *ET AL.*,

Respondents.

On Petitions for Writ of Certiorari
to the Supreme Courts of Wisconsin and Ohio

BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, ET AL. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal statute providing enhanced penalties where a victim is selected "because of" or "by reason of" his or her actual or perceived race, religion, color, disability, sexual orientation, national origin or ancestry is unconstitutional under the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

A. The Anti-Defamation League

The Anti-Defamation League ("ADL") is one of the nation's oldest civil rights organizations, founded in 1913 to promote good will among all races, ethnic groups and religions. As set out

in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For almost 80 years, ADL has been active in the fight against discrimination in employment, housing, education, and public accommodations. ADL also believes very strongly that the First Amendment embodies core civil rights that are essential to ADL's ultimate purpose. ADL is acutely aware that the war against racial hatred and religious intolerance must be waged in a manner that neither threatens nor impinges upon First Amendment freedoms.

After three consecutive years in which ADL's annual audit of anti-Semitic incidents revealed a dramatic increase in anti-Semitic violence nationwide, ADL developed a program in 1981 designed to counteract anti-Semitic and racist hatred and violence. Media exposure, education, and more effective law enforcement are important features of the campaign, but the cornerstone of ADL's program is the staunch support of so-called "hate crime" legislation providing enhanced penalties for certain crimes when they are committed by reason of the victim's actual or perceived race, religion, sexual orientation, or national origin. ADL has a direct interest in *State v. Mitchell*, Case No. 92-515, and *State v. Wyant, et al.*, Case No. 92-568, because the statutes set aside in both cases as unconstitutional were based on a model "hate crimes" bill drafted by ADL's Legal Affairs Department and first published by ADL in 1981.[1]

ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty enhancement hate crime legislation, in urging the Court to grant certiorari in both *Mitchell* and *Wyant*. These decisions by the Supreme Courts of Wisconsin and Ohio, improperly relying upon *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S., ___, 112 S. Ct. 2538 (1992), have cast a dark shadow of constitutional confusion and doubt – not only on the hate crime statutes now

1. As explained further herein, in order to ensure that ADL's Model Bill did not run afoul of the First Amendment, ADL utilized language from various civil rights statutes had been upheld as constitutional. The original bill has undergone minor revisions since 1981, but its essence is unchanged.

in effect in 46 states and the District of Columbia (more than half of which are either based on or similar to ADL's Model Bill) – but also on proposed federal hate crime legislation presently under consideration in Congress. Certiorari must be granted to resolve this doubt and to provide essential guidance to perplexed legislators and law enforcement officials around the country. ADL firmly believes that most hate crime laws now in effect are consistent with the First Amendment, both on their face and as enforced. But unless the doubt and confusion on this point are resolved by the Court, the fight against ethnic intolerance and racist violence will be deprived of an essential weapon.

B. Additional *Amici Curiae*

The following organizations, listed alphabetically, join the ADL as *Amici Curiae* in urging the Court to grant the Petitions for Certiorari in *Mitchell* and *Wyant*. The interests of each such organization in *Mitchell* and *Wyant* are provided in Appendices A – M hereto:

Appendix	Organization
A	The American Jewish Congress
B	The Center for Women Policy Studies
C	The Fraternal Order of Police
D	The Human Rights Campaign Fund
E	The National Council of Jewish Women
F	The National Gay and Lesbian Task Force
G	The National Institute Against Prejudice & Violence
H	The National Jewish Community Relations Advisory Council
I	The National Organization of Black Law Enforcement Executives
J	The Organization of Chinese Americans
K	The Police Executive Research Forum
L	The Southern Poverty Law Center
M	The United States Conference of Mayors

SUMMARY OF THE ARGUMENT

Crimes in which the victim is selected because of his or her actual or perceived race, religion, color, disability, sexual orientation, national origin or ancestry are a problem of national scope. All indications are that such "hate crimes" are on the rise. In response, 46 states and the District of Columbia have enacted statutes which seek to redress hate crimes. Proposed federal legislation is under consideration in Congress. Certain legislators, law enforcement officials and a segment of the general population apparently believe that *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S. Ct. 2538 (1992), vitiated all such hate crime statutes, although the Supreme Court did not intend to do so. State courts considering hate crime laws in the wake of *R.A.V.* are taking diametrically opposed positions on the question of whether such laws comport with the First Amendment. The validity of other time honored anti-discrimination laws is being questioned because of their marked similarity to the hate crime statutes at issue in these cases.

Amici urge the Court to grant Certiorari in *State v. Mitchell*, Case No. 92-515, and *State v. Wyant*, Case No. 92-568, to provide badly needed guidance to state and federal legislators, to resolve the conflict among state courts on the constitutionality of hate crime legislation, and to confirm the basis under which other anti-discrimination laws comport with the First Amendment.

ARGUMENT

I. HATE CRIMES: A NATIONAL PROBLEM

In a suburb of Washington, D.C., two white men assault a black woman walking toward a shopping mall, rip off her clothes, douse her with lighter fluid and, yelling "nigger," threaten to set her on fire.[2] In the Crown Heights neighborhood of Brooklyn, New York, a mob's cries of "Kill the Jew" echo through the

2. Twomey, Steve, *A Night of Hate in Wheaton*, Washington Post, March 5, 1992.

streets before a 29-year-old Jewish scholar is stabbed to death.[3] In Kentucky, a group of assailants beat a young gay man with a tire iron and lock him in a car trunk full of snapping turtles, leaving him with severe brain damage.[4] A riot erupts in Los Angeles, California after four white police officers are acquitted of illegally beating a black motorist, and, in the midst of the chaos, a group of black rioters pull a white motorist from his truck and viciously beat him. A young black man is struck by a car and murdered after a gang of young white men chase him onto a highway in a Queens, New York neighborhood called Howard Beach.

Like a recurring nightmare, Americans in every part of the country have awakened to these and a host of similar headlines in the past few years. And unfortunately, the racial, ethnic and anti-homosexual motivated crimes that make the headlines are but the tip of the iceberg of a national problem. Less publicized are the thousands of less sensational incidents of assault, battery, threats and vandalism prompted by the same animus.

The conduct targeted by the legislation at issue in *Mitchell* and *Wyant* is a distinct breed of criminal behavior, rooted in a set of motives unlike those that prompt conventional criminal acts. These are not incidents where a criminal – in the course of a burglary or a mugging – realizes his victim's minority status and utters a racist or anti-Semitic remark. These are crimes where the victim is selected *because* of his or her actual or perceived status; where the racial, religious or similar animus is the *reason* for the crime. And while such crimes are assuredly an ugly chapter in America's past, they cannot be relegated to the history books. There is every indication that violence prompted by the race, religion, ethnicity, sexual orientation or national origin of the victim is on the rise.

ADL has been closely tracking one type of hate crime – anti-Semitic violence and vandalism – since 1960. Broadening

3. On the night of August 19, 1991, following the tragic accidental death of a black child in an automobile mishap, a group of young rioters stabbed Yankel Rosenbaum, who died late in a local hospital.

4. Peirce, Neal R., *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States.

its efforts, ADL began publishing in 1979 an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. The Audits conducted over the first three years revealed a substantial increase in anti-Semitic vandalism and violence. From 1982 to 1986, ADL's Audits revealed a general downward trend in such incidents. Suddenly, in 1987, the number of anti-Semitic incidents began to spiral upward. There was a 17% increase in anti-Semitic incidents in 1987 over 1986. For the next five years, the upward spiral continued, culminating last year with the highest total ever reported to ADL – 1,879 separate incidents of anti-Semitic violence, vandalism and harassment reported from 42 states and the District of Columbia.

The reported incidents included several fire-bomb and arson attacks on synagogues in California, Jewish cemetery desecrations in nine states and hundreds of assault incidents throughout the country. Most disturbing was the fact that for the first time since the Audits began, there were more attacks on Jewish individuals than against synagogues and property. The number of physical assaults in 1991 was double the number reported in 1990.

Hate crimes focused on other minorities are also on the rise. Recently, *Amicus Curiae* the United States Conference of Mayors sent a survey on hate crimes to over 1,000 cities. Between 1990 and 1991, incidents of hate violence increased in 36% of the responding cities and remained the same in 58%. Only 6% of the responding cities reported a decrease.[5] Data collected pursuant to various states' hate crime reporting regulations indicate a dramatic increase in hate crimes between 1990 and 1991 in Connecticut, Massachusetts and New Jersey, with Florida also reporting a rise. *Amicus Curiae* the National Gay and Lesbian Task Force reported 7,031 incidents of anti-homosexual violence in 1989.[6] A recent report revealed a 31%

5. *Addressing Racial and Ethic Tensions: Combatting Hate Crimes in America's Cities,* United States Conference of Mayors, Anti-Defamation League, June 1992.

6. *Anti-Violence Project, National Gay and Lesbian Task Force, Anti-Gay Violence, Victimization and Defamation in 1989* (1990). See also, Note, *Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1541–42 (1989).

increase in attacks on gay and lesbian individuals in each of five major metropolitan areas in 1991 over 1990.

II. PENALTY ENHANCEMENT HATE CRIME LEGISLATION: AN ESSENTIAL WEAPON IN THE FIGHT AGAINST HATE VIOLENCE

Amici recognize that hatred cannot be legislated out of existence and the long term solution to racism and ethnic bigotry is education and experience. Without a doubt, however, legislation that increases the penalty for hate crimes has been a powerful tool in redressing the problem.[7] Penalty enhancement hate crime legislation is key to the nationwide campaign against hate violence and vandalism. 46 states have now enacted some form of hate crime legislation, more than half of them based upon or similar to ADL's model penalty enhancement approach.[8]

The type of hate crime legislation sponsored by ADL since 1981 and upon which the statutes in *Mitchell* and *Wyant* are based centers on the principle of penalty enhancement. The concept is a simple one: bigoted thoughts or speech are not punished; each of the *Amici* believes very deeply in freedom of

7. The extent and national scope of the problem has prompted legislatures, law enforcement authorities and various organizations around the country to take a variety of other actions. For example, in 1990, President Bush signed into law the Hate Crimes Statistics Act ("HCSA"), P.L. 101-275, which requires the Justice Department to acquire data on the hate crimes and to publish an annual summary of findings. This data is collected through the FBI's Uniform Crime Reporting Program, encompassing 16,000 state and local law enforcement agencies.

8. ADL's Model Bill provides as follows:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assualt and/or other appropriate statutorily prescribed criminal conduct).

B. Intimidation is a ____ misdemeanor/felony (the degree of the criminal liabilty should be at least one degree more serious that that imposed for commission of the offense).

speech and thought – to borrow the words of Justice Holmes, this includes "freedom for the thought we hate."[9] Rather, it is only when the victim of a crime is selected "because of" or "by reason of" his or her minority status that the prosecutor may seek a stepped up penalty. And it is only the criminal act that is punished. Significantly, before the increased penalty can be imposed, the prosecution must prove, beyond a reasonable doubt, that the crime was bias-motivated.

This type of legislation serves several important purposes, squarely within the power and responsibility of state and local governments (and the federal government):

First and foremost, hate crime legislation embodies a crucial policy decision to recognize and address seriously the hate crime phenomenon. In terrorizing their victims and instilling fear and anxiety in the community, hate crimes are like other crimes. However, because of the unique and perverse motives that prompt them, hate crimes tear at the fragile bonds that hold together America's diverse and eclectic society. They not only intimidate and threaten the individual victim but also entire communities, making large sections of the population feel vulnerable and unprotected by the law. Hate crimes thus provoke retaliation and lawlessness, perpetuating a cycle of fear and mistrust between communities. Hate crime laws ensure that the targeted group perceives that law enforcement officials take their concerns seriously. By enforcing these laws, an isolated incident is less likely to create anxiety in the wider community; the potential of an incident to erupt into a widespread disturbance is minimized.

Second, law enforcement authorities believe these laws have a deterrent effect by making it clear that hate crimes will be considered particularly serious and will be dealt with accordingly. While there have been no studies on the point, it is apparent that law enforcement officials deeply appreciate the deterrent effect of hate crime laws. For example, when it became apparent that the Court's decision in *R.A.V.* was being misunderstood by large segments of the population to vitiate all

9. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

hate crime laws, Chicago's Police Superintendent, the United States Attorney, the Cook County State's Attorney and various other Chicago law enforcement officials felt that they needed to hold a rare and widely publicized press conference to send the signal that there was no "window of opportunity" for bigots.[10]

Finally and simply, the penalty enhancement concept allows society to redress a unique type of wrongful conduct in a manner that reflects its seriousness. It is within the power of government to give such crimes the special treatment that they deserve. As aptly explained by the Supreme Court of Oregon in its recent decision upholding the Oregon hate crime law and specifically disagreeing with the decision in *Mitchell*,

> Such crimes – because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member – invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs. Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.

State v. Plowman, 314 Ore. 157, ___ P.2d ___, 1992 WL 207677 at *5 (1992).

10. Sandberg, Michael A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5.

III. STATEMENT OF THE CASE

Amici Curiae adopt the Statements of the Case in the Petitions for Certiorari submitted in *Mitchell* and *Wyant*.

IV. CERTIORARI SHOULD BE GRANTED IN *STATE v. MITCHELL* AND *STATE v. WYANT*:

1. TO PROVIDE BADLY NEEDED GUIDANCE TO STATES AND THE FEDERAL GOVERNMENT ON THE CONSTITUTIONALITY OF PENALTY ENHANCEMENT HATE CRIME LEGISLATION;

2. TO CLARIFY THE BASIS UNDER WHICH OTHER ANTI-DISCRIMINATION LAWS COMPORT WITH THE FIRST AMENDMENT; AND

3. TO RESOLVE A CONFLICT AMONG STATE COURTS ON A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW.

Amici firmly believe that the Supreme Court did not intend to abrogate the laws now in effect in a majority of states (and presently under consideration in Congress) that increase penalties for bias-motivated crimes. In *Dawson v. Delaware*, ___ U.S. ___, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), the Court explained that evidence of racial intolerance is a valid factor in sentencing a defendant, "where such evidence [is] relevant to the issues involved:"

> [T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Dawson, 112 S. Ct. at 1097.

Similarly, in *R.A.V.*, *supra*, the Court made clear that conduct is not shielded from regulation merely because it may "express" a discriminatory idea or philosophy (where such conduct is not targeted on the basis of its expressive content). 112 S. Ct. at 2546-47. Unlike the St. Paul, Minnesota ordinance involved in *R.A.V.*, ADL's recommended approach, embodied

in the Wisconsin and Ohio statutes at issue in *Mitchell* and *Wyant*, does not target conduct on the basis of its expressive content but targets conduct already defined as criminal.[11] Penalties are enhanced – not because of any message or thought conveyed through the crime – but because a particularly heinous motive prompted the selection of the victim, and because society has an interest in minimizing the potentially wide-ranging effects of this type of crime.

To the extent that a racial or anti-Semitic assault or a "gay-bashing" express certain "thoughts" or "beliefs," the penalty enhancement approach is admittedly a form of "content discrimination." However, since penalties are enhanced for actions already defined as criminal, "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. Under the penalty enhancement approach, it is criminal conduct that is sought to be "suppressed," not the ideas or philosophies that prompt hate crimes. As the Court acknowledged in *R.A.V.*, "We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *R.A.V.*, 112 S. Ct. at 2544. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activity that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"). In the words of this Court,

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit

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11. The *Amici* did not all agree that the St. Paul ordinance at issue in *R.A.V.* was constitutional. ADL, for example, filed a brief in *R.A.V.*, supporting the City of St. Paul's position. (ADL acknowledged, however, that the St. Paul ordinance – in sanctioning a racist and bigoted messages rather than enhancing penalties for bias-motivated crimes – was not ADL's recommended approach. ADL believed the St. Paul ordinance was constitutional only because the Minnesota Supreme Court limited its applicability to "fighting words"). All of the *Amici* herein agree that the statute at issue in *Mitchell* and *Wyatt* comport with the First Amendment.

that may be derived from them is clearly outweighed by the social interest in order and morality.'

R.A.V., 112 S. Ct at 2542-43.

The Wisconsin and Ohio statutes do not punish "speakers who express views on disfavored subjects," *R.A.V.*, 112 S. Ct. at 2547, or attempt to "drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, ___ U.S. ___, 112 S. Ct. 501, 508 (1991). These and other penalty enhancement hate crime statutes leave racists and bigots free to think, speak, believe and express their views within the full range of permitted conduct under the First Amendment.

Despite the Court's careful language in *R.A.V.* (and other decisions such as *Dawson* and *Barclay*), commentators, courts, law enforcement authorities and a large segment of the general population have been left utterly confused about the impact of *R.A.V.* on the hate crime laws in effect in 46 states and the District of Columbia. The Supreme Court's decision in *R.A.V.* was widely reported in the media as potentially jeopardizing all hate crime laws.[12] For example, the Boston Globe reported, "The *[R.A.V.]* ruling calls into question the hate crime laws adopted nationwide during the past decade. . . . its eventual impact remains unclear."[13] The *Washington Post* reported, "The Supreme Court yesterday unanimously struck down a St. Paul, Minn., hate crimes law, casting doubt on the constitutionality of scores of other state and local laws . . ."[14] One scholar noted that "*[i]*t's going to be very difficult for elected officials, and maybe even the lawyer retained to give them advice, to say with certainty what can be prohibited and what cannot."[15]

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12. Freeman, Steven M., *Hate Crimes: They're Still Against the Law*, ADL On the frontline, September 1992, at B-1.

13. Lehr, Dick, *High Court Overturns 'Hate Crime' Ordinance*, Boston Globe, June 23, 1992, at National/Foreign 1.

14. Marcus, Ruth, *Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far-Reaching*, Washington Post, June 23, 1992, at A-1.

15. Campbell, Geoffrey A., *Supreme Court Rejects St. Paul Ordinance Banning Hate Speech; Gives No Guidance*, Bond Buyer, June 23, 1992, at 2.

Most disturbing has been the impact on those law enforcement authorities dedicated to enforcing hate crime laws. After the *R.A.V.* decision was handed down, certain of ADL's regional offices reported that police officers were declining to take hate crimes reports because they thought that the statutes were no longer constitutional.[16] The *Wall Street Journal* reported: "Confusion over the constitutionality of hate-crime statutes has made some law-enforcement officials and judges wary about enforcing the laws, even though many would likely survive court challenges."[17] According to the *Wall Street Journal*, "the misunderstandings have led attorneys general in Minnesota and Massachusetts to plan a mailing to law enforcement officers and district attorneys reminding them that they should continue to enforce hate-crime laws."[18]

The House Judiciary Subcommittee on Crime and Criminal Justice held hearings on the impact of *R.A.V.* on the proposed federal hate crime legislation at which several constitutional scholars testified.[19] As aptly summarized by Congressman

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16. Sandberg, Mitchell A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5. Many callers on talk radio shows believed that the Supreme Court had gone so far as to declare perfectly lawful the midnight cross-burning by a white teenager on the lawn of a black family in a primarily white St. Paul, Minnesota neighborhood.

17. Hetter, Katia, *Enforcers of Hate-Crime Laws Wary After High Court Ruling*, Wall Street Journal, August 13, 1992, at B-1.

18. Hetter, *supra* at n. 17.

19. The proposed federal law, H.R. 4797, provides:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

SECTION 2. DIRECTION TO COMMISSION.

(a) IN GENERAL—Pursuant to section 994 of title 28, United Stated Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. In carrying out this section, the United States Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances which might justify exceptions.

(b) DEFINITION.—As used in this Act, the term "hate crimes" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice,

Charles E. Schumer in his opening remarks at the hearing,

> [T]he efforts of the States and the Federal Government have been thrown into turmoil in the wake of the Supreme Court's recent decision in *R.A.V. v. The City of St. Paul*. That decision raised almost as many questions as it answered. Are all hate crimes statutes unconstitutional? Are hate crimes sentencing enhancement statutes unconstitutional? The *R.A.V.* decision is already having a substantial impact on courts that are attempting to grapple with these questions.

While some of the scholars and practitioners who testified believed that the proposed House bill did not run afoul of the First Amendment in light of *R.A.V.*, some had serious doubts and some expressed the view that the bill would be held unconstitutional.

If the Petitions for Certiorari in *Mitchell* and *Wyant* are granted, the Court can render clear answers to these questions, provide badly needed guidance to state and federal governments and law enforcement officials, and curtail what will surely be long, expensive and frustrating litigation on the "meaning" of *R.A.V.* as respects other hate crime laws.

Amici urge the Court to grant the Petitions in both cases, rather than to select one as more deserving of consideration than the other. By considering both cases, the Court will be in a better position to resolve once and for all certain of the First Amendment issues that have arisen under hate crime laws. The impact of constitutional considerations on a wider variety of underlying facts and circumstances can be analyzed. Certain differences in the statutory language adopted in Wisconsin and Ohio can also be addressed. In sum, more meaningful and useful guidance will be provided to legislators, courts and law enforcement authorities in 46 states by considering both *Mitchell* and *Wyant*.

NOTES *(Continued)*

based on the actual or perceived race, color, religion, national origin, ethnicity, gender,or sexual orientation of antoehr individual or group of individuals.

Petitioners in their respective Briefs have provided excellent arguments for the granting of Certiorari, and *Amici* will not burden the Court by repeating their arguments here. We emphasize, however, that three immediate and disastrous consequences of the *R.A.V.* decision's misinterpretation will be rectified if the Court grants the Petitions for Certiorari in *Mitchell* and *Wyant*:

THE COURT CAN REINSTATE THE WISCONSIN AND OHIO STATUTES AND PREVENT SIMILAR MISINTERPRETATIONS OF *R.A.V.* IN OTHER STATES

First, the Court can right the course of hate crime legislation in the states of Wisconsin and Ohio, and prevent the potential derailment of hate crime legislation in other states. Because the Supreme Courts of Wisconsin and Ohio have utterly misinterpreted *R.A.V.* and other decisions by the United States Supreme Court, the people of Wisconsin and Ohio have been deprived of an essential weapon in the fight against racial and ethnic violence that fully comports with the requirements of the First Amendment.

While Petitioners in both cases have ably explained this point, we stress one important issue. As noted above, in *Dawson*, supra, and *Barclay*, supra, the Court made clear that evidence of racial intolerance is a valid factor in sentencing a defendant. In *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597 (1991), the Court found that victim impact evidence is a legitimate factor in sentencing.

The *Mitchell* court's flawed reasoning is nowhere more apparent than in its effort to distinguish its holding from *Dawson* and *Barclay*. The thin reed upon which the Wisconsin court bases its remarkable conclusion that the motivation for a crime is "entitled to the full protection of the First Amendment" is that the sentencing factors considered by a judge are somehow accorded greater deference than sentencing factors provided in a statute. The Court stated:

> Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but

> it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

Mitchell, 485 N.W. 2d. at 815, n. 17.

Since the end result of both a judge-imposed and a legislature-imposed penalty for a hate crime is an enhanced sentence, the Wisconsin court's argument is a distinction without a difference. As the Petitioner in *Mitchell* points out, the Supreme Court has long held that sentencing is a power shared by the legislative and judicial branches. *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

It *is* "quite a different matter" to include a penalty enhancer in a statute rather than rely on a judge to enhance penalties in sentencing a defendant, but the difference is not what the Wisconsin court had in mind. A defendant accused of selecting his victim because of racial or ethnic animus is afforded far greater procedural safeguards in a legislature-imposed enhanced sentence under ADL's model legislation and the statutes at issue in *Mitchell* and *Wyant* than in a judge-imposed enhanced sentence (as permitted under *Dawson, Payne* and *Barclay*). As opposed to the factors that judges may consider in sentencing, under the ADL model law and the Wisconsin and Ohio statutes, a sentence may only be enhanced if the bias-motive is proven *beyond a reasonable doubt*. Thus, to the extent that there is any difference between what the Supreme Court permits in *Dawson, Payne* and *Barclay* and what legislatures accomplish in enacting hate crime legislation, it is that the legislative approach has the added prophylactic benefit of a higher evidentiary standard.

THE COURT CAN CLARIFY THE BASIS UPON WHICH ANTI-DISCRIMINATION LAWS COMPORT WITH THE FIRST AMENDMENT

A second adverse result of *R.A.V.*'s misinterpretation that can be rectified by the granting of Certiorari in *Mitchell* and *Wyant* is the overriding perception that – from Title VII to the

Fair Housing Act to antidiscrimination laws in education and jury selection – *R.A.V.* renders questionable the constitutionality of the nation's body of anti-discrimination laws. As Justice Bablitch asks in his dissent in *Mitchell*, "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?" In his testimony before the House Subcommittee considering the constitutionality of the proposed House Bill on hate crimes, Professor Laurence Tribe noted: "If *R.A.V.* were to cast a constitutional shadow over the Hate Crimes Sentencing Enhancement Act, precisely the same shadow would befall this entire corpus of anti-discrimination law."

The Wisconsin Supreme Court's struggle to reconcile its decision overturning the Wisconsin hate crime law (improperly relying on *R.A.V.*) with state and federal anti-discrimination laws is a prime example of the manner in which anti-discrimination laws have been drawn into the fray over hate crime laws. The court stated:

> We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

Mitchell, 485 N.W.2d at 817, n. 21

This reasoning is doubly wrong. Penalty enhancement hate crime legislation is no more concerned with motive and no less concerned with conduct than anti-discrimination laws. In language, structure and application, the laws are completely analogous.[20] Under the Wisconsin law, the penalty is enhanced where the victim is intentionally selected "*because of*" his or her race, religion, color, disability, sexual orientation, national origin or ancestry. Under the Ohio law, the penalty is enhanced

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20. As noted above, ADL's Legal Affairs Department employed the language and structure of federal and state anti-discrimination laws (already upheld as constitutional) in drafting the Model Bill in 1981.

if the victim is selected "*by reason of*" his or her race, color, religion, or national origin. Similarly, Title VII, as amended by § 2000e-2(a)(1), prohibits various employment actions "*because of*" the employee or prospective employee's race, color, religion, sex or national origin. 42 U.S.C. § 3604 prohibits interference with housing choices "*because of* [the victim's] race, color," or other listed status.

Moreover, to rest so important a point on a presumed distinction between "redressing" and "punishing" begs the question. "Punishment" is a form of "redressing;" to say that it is permissible to consider motive when "redressing" conduct, but impermissible where society "punishes" for the same conduct is word play. It is also incorrect, for as Petitioner in *Mitchell* points out, criminal penalties do attach to certain anti-discrimination law violations. Further, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages depending on such factors as the defendant's "evil motive or intent. . . " *Smith v. Wade*, 461 U.S. 30, 56 (1983). "This issue 'typically demands inquiry into the actor's subjective motive and purpose.'" Smith, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

THE COURT CAN RESOLVE A CLEAR AND DIRECT CONFLICT AMONG STATE COURTS ON A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW

A third untoward result of *R.A.V.*'s misinterpretation by the Wisconsin and Ohio Supreme Courts that can be remedied by the granting of Certiorari in *Mitchell* and *Wyant* is the direct conflict that now exists between several states on a substantial question of federal constitutional law. States are taking diametrically opposed positions on the application of the First Amendment to hate crime laws.

For example, one day after the Ohio Supreme Court's decision overruling the Ohio hate crime penalty enhancer, the Oregon Supreme Court held that an analogous Oregon law satisfied the requirements of the First Amendment as interpreted in *R.A.V. State v. Plowman*, 314 Ore. 157, ___ P.2d

___, 1992 WL 207677 (1992). The Oregon court expressly disagreed with the reasoning of the Wisconsin court in *Mitchell*.

More recently, a Florida intermediate appellate court held that Florida's hate crime law, also based on the ADL model bill and also similar to the statutes overturned in *Mitchell* and *Wyant*, fully comported with the requirements of the First Amendment and this Court's decision in *R.A.V. Dobbins v. State of Florida*, Case No. 91-1953 (Fla. 5th DCA September 25, 1992).

A New York court has also upheld the constitutionality of a penalty enhancement hate crime law. *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

Cases in which the constitutionality of hate crime laws are at issue are presently pending before intermediate appellate and supreme courts in California, Florida, New Jersey, Michigan, Vermont and the State of Washington.

In sum, the interplay between the First Amendment and hate crime legislation enacted in 46 states is now in a perilous state of flux and turmoil. The situation is intolerable. Certiorari must be granted in *Mitchell* and *Wyant* to guarantee the uniform application of the United States Constitution throughout the nation.

CONCLUSION

For the reasons stated herein, *Amici Curiae* urge the Court to grant Certiorari in *State v. Mitchell* and *State v. Wyant, et al.*

Respectively submitted,

David M. Rain

Counsel for *Amici Curiae*

APPENDIX A:
THE AMERICAN JEWISH CONGRESS

The American Jewish Congress is an organization founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has long supported the use of the law, including the criminal law, to punish those who would discriminate against American citizens because of their race, religion, sex, sexual orientation, or national origin. Crimes in which the victim is selected because of these suspect grounds tear at the fabric of society. Such offenders must be treated and punished with utmost seriousness.

Because Ohio and Wisconsin's laws are important weapons in the war against violent bigotry, the American Jewish Congress joins in this brief.

APPENDIX B:
THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies (the "CWPS") was established in 1972 as the first independent national public policy research and advocacy institute focused specifically on improving the social, legal, and economic status of women. Underlying all of the Center's work is the premise that sexism and racism must be addressed simultaneously. The Center looks at the impact of combined race- plus-sex bias on women of color, women from diverse socioeconomic backgrounds, women of diverse sexual identities, women with disabilities, and women of different ages. In 1991 the Center published a policy paper, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, participated in coalitions and task forces on hate crimes and the Violence Against Women Act. In September, 1992 the CWPS convened a "Think Tank" to consider the efficacy and legitimacy of defining civil rights remedies for acts of hate violence against women. Based on our concern and interest for individual rights we join in urging the Court to grant the petitions for the writ of Certiorari.

APPENDIX C:
THE FRATERNAL ORDER OF POLICE

The Fraternal Order of Police (FOP) is the nation's largest law enforcement organization; with over 240,000 members throughout the United States. Founded in 1915, the FOP represents professional, full-time officers from all agencies of law enforcement on the federal, state and local levels.

Through the years, the FOP has developed a proud tradition of leadership in national affairs and has a history of commitment to insuring that society as a whole is equally protected under the law.

The FOP believes that hate crimes deprive society of this equal treatment under the law and the nation's law enforcement has more than a mere duty to respond against this bias.

Assisting law enforcement in their endeavor to insure equal treatment under the law are statutes in certain states (31) that provide for penalty enhancement for violations of hate crimes laws. The FOP also believes these penalty enhancement statutes also serve as a deterrent to would-be violators.

The FOP believes that the question raised by the rulings in *State v. Mitchell* and *State v. Wyant* threaten the effective policing of hate crimes which is so important to the order of this nation.

APPENDIX D:
THE HUMAN RIGHTS CAMPAIGN FUND

The Human Rights Campaign Fund is the largest political organization representing gay and lesbian Americans. Hate crimes motivated by the sexual orientation of the victim are on the rise in many major American cities, and the National Institute of Justice has estimated that crimes against gay and lesbian Americans may be the largest category of hate crimes. The Human Rights Campaign Fund and the Americans it represents believe that government must have the tools, such as the laws at issue in this case, to deal effectively with this growing problem.

APPENDIX E:
THE NATIONAL COUNCIL OF JEWISH WOMEN

Founded in 1893, the National Council of Jewish Women ("NCJW") is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our "National Resolutions," which include working for "the enactment and enforcement of laws and regulations which protect individual rights and civil liberties", we join in urging the Court to grant the petitions for writ of Certiorari.

APPENDIX F:
THE NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force ("NGLTF") is the oldest national gay and lesbian civil rights advocacy organization in the U.S. Since 1973, NGLTF has worked to eradicate prejudice, discrimination and violence based on sexual orientation and HIV status. Since 1984, NGLTF has noted in its annual audit of anti-lesbian and anti-gay incidents a steady rise in defamation, harassment, violence and attacks. NGLTF supports hate crimes penalty enhancement legislation as part of the overall effort to count and counter crimes which target individuals on the basis of their race, religion, creed, color, sex, national origin or sexual orientation.

NGLTF balances its interest in countering violence against lesbians and gay men with its interest in protecting First Amendment rights. NGLTF has been at the forefront of the fight to support the right of lesbians and gay men to speak their minds and publish their ideas. Indeed, NGLTF is acutely aware that bias violence abridges the First Amendment rights of its victims by making them afraid to assemble and organize.

It is out of these dual interests that NGLTF joins ADL in urging the Court to grant Certiorari in both *Mitchell* and *Wyant* to resolve the confusion and doubt cast by these decisions.

APPENDIX G:
THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

The National Institute Against Prejudice & Violence ("NIAPV"), created in 1984, is the only national center dedicated exclusively to studying and responding to ethnoviolence – psychological and physical violence motivated by race, religion, ethnicity, sexual orientation or gender. While other organizations deal with selected aspects of these problems, NIAPV is unique in its comprehensive approach. NIAPV's landmark social science research is the foundation of training and educational programs addressing the causes and effects of ethnoviolent victimization in communities, schools and workplaces; cultural differences that cause intergroup tension; effective communication and conflict resolution; and the development of procedures for reporting and responding to incidents. NIAPV also acts as a clearinghouse of information on reported incidents of intergroup conflict and model programs of response; tracks the quantity and quality of news media activity; publishes reports and educational materials; and works for the enactment of appropriate legislation.

NIAPV's research clearly establishes both the pervasiveness of ethnoviolence as well as the greater traumatic impact of ethnoviolence on the victim. In a 1987 study of a college campus ("The UMBC Study") NIAPV found that 20 percent of ali minority students experienced at least one act of ethnoviolence during the academic year studied. Numerous replications of The UMBC Study at campuses around the country, and analysis of other similar campus research, confirm the 20 percent figure as a conservative estimate of the number of minority students nationwide who are victims of ethnoviolence during an academic year. The traumatic effects of the victimization were found to be often serious and long-lasting.

In 1989, pursuant to a grant from the Ford Foundation, NIAPV conducted the first national study of the prevalence and impact of ethnoviolent victimization in the general population ("The National Victimization Survey"). The findings of this study, based upon telephone interviews completed with 2,078

people in a stratified random sample of the contiguous United States, showed that at least 7 percent of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. On a scale of nineteen, standard psychophysiological symptoms of stress, victims of ethnoviolence suffered, on average, 21% more of these symptoms than did victims of similar acts of ordinary violence or abuse (5.8 symptoms versus 4.8). Preliminary findings of a recently-completed study of a large corporate setting, funded by the National Institute of Justice, confirm the earlier studies and indicate that ethnoviolence is even more pervasive in the workplace than in the larger community.

NIAPV's research consistently finds that verbal and symbolic expressions of prejudice cause measurable and substantial trauma to their targets. Still, NIAPV has always held that most such expressions, as odious as they are, must be protected by the First Amendment if freedom of speech is to remain a central value of our society. For example, NIAPV believes that group defamation is protected by the First Amendment; and most face-to-face insults and slurs which do not amount to actual threats of violence or "fighting words" are also protected speech. In such cases it is our responsibility to understand who is paying the price to preserve the freedom of speech and to take committed action in other areas to ameliorate the harmful effects on its victims.

Millions of Americans know firsthand the vicious harm inflicted by acts of ethnoviolence, and this is reflected in wide and strong support for the many so-called "hate crime" laws which have been enacted in the states. The recent uprisings in Los Angeles and other cities are truly the tip of a large and explosive iceberg of intergroup tensions and conflict. While the law alone cannot begin to solve these problems, nevertheless it has a critical role to play in combatting their most harmful manifestations. NIAPV believes that the ADL model "hate

crime" statute represents a responsible and effective effort to combat ethnoviolent crimes while protecting the freedom of speech under the First Amendment. The decisions in *State v. Mitchell* and *State v. Wyant* reflect confusion over the appropriate First Amendment standards by which "hate crime" laws should be evaluated. The corrective guidance of this Court is desperately needed.

For the reasons stated above, NIAPV joins ADL in urging the Court to grant the Petitions for Certiorari in *Mitchell* and *Wyant*.

APPENDIX H:
THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization for Jewish community relations in the United States, and consists of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member agencies representing Jewish communities throughout the United States (listed below).

As the national planning and coordinating body for the field of Jewish community relations, NJCRAC is dedicated to preserving and protecting the principles embodied in the Bill of Rights – particularly the First Amendment – and is equally committed to the counteraction of discrimination and bigotry in the society. The NJCRAC believes that this balancing of sometimes conflicting interests, in the larger context of constitutional protections, is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

NJCRAC Constituent Organizations

National Agencies

American Jewish Committee
American Jewish Congress
B'nai B'rith
Anti-Defamation League
Hadassah
Jewish Labor Committee
Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations

Union of Orthodox Jewish Congregations of America
United Synagogue of Conservative Judaism/Women's League for Conservative Judaism
Women's American ORT

Community Agencies*

Alabama

CRC of the Birmingham Jewish Federation

Arizona

CRC of the Greater Phoenix Jewish Federation JCRC of the Jewish Federation of Southern Arizona

California

Jewish Federation of Greater Long Beach and West Orange County
CRC of the Jewish Federation- Council of Los Angeles
JCRC of the Greater East Bay
Jewish Federation of Orange County
JCRC of Sacramento
JCRC of United Jewish Federation of San Diego
JCRC of San Francisco, the Peninsula, Marin and Sonoma Counties
JCRC of Greater San Jose

Connecticut

Jewish Federation of Greater Bridgeport
Jewish Federation of Greater Danbury
Jewish Federation of Eastern Connecticut
CRC of Greater Hartford Jewish Federation
Jewish Federation of Greater New Haven
United Jewish Federation of Stanford
Jewish Federation of Waterbury

Delaware

Jewish Federation of Delaware

District of Columbia

Jewish Community Council of Greater Washington

Florida

Jewish Federation of South Broward
Jewish Federation of Fort Lauderdale
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Jewish Federation of Greater Orlando
Jewish Federation of Palm Beach County
Jewish Federation of Pinelas County
Sarasota-Mantes Jewish Federation
South Palm Beach County Jewish Federation

Georgia

Atlanta Jewish Federation
Savannah Jewish Federation

Illinois

JCRC of the Jewish Limited Fund of Metropolitan Chicago
Jewish Federation of Peoria
Springfield Jewish Federation

Indiana

Indianapolis JCRC
Jewish Federation of St. Joseph Valley

Iowa

Jewish Federation of Greater Des Moines

Kansas

(See Missouri)

Kentucky

Central Kentucky Jewish Federation
Jewish Community Federation of Louisville

Louisiana

Jewish Federation of Greater Baton Rouge
Jewish Federation of Greater New Orleans
Shreveport Jewish Federation

Maine

Jewish Federation Community Council of Southern Maine

Maryland

Baltimore Jewish Council

Massachusetts

JCRC of Greater Boston
Jewish Federation of North Shore
Jewish Federation of Greater New Bedford
Jewish Federation of Greater Springfield
Worcester Jewish Federation

Michigan

Jewish Community Council of Metropolitan Detroit
Flint Jewish Federation

Minnesota

JCRC/Anti-Defamation League of Minnesota and the Dakotas

Missouri

Jewish Community Relations Bureau/American Jewish Committee of Greater Kansas City
St. Louis JCRC

Nebraska

ADL/CRC of the Jewish Federation of Omaha

New Jersey

Federation of Jewish Agencies of Atlantic County

United Jewish Community Bergen County/North Hudson
Jewish Federation of Central New Jersey
Jewish Federation of Clinton-Passaic
MetroWest United Jewish Federation
Jewish Federation of Greater Middlesex County
JCRC Jewish Federation of North Jersey
JCRC of Southern New Jersey
Jewish Federation of Mercer and Bucks Counties

New Mexico

Jewish Federation of Greater Albuquerque

New York

Jewish Federation of Broome County
Jewish Federation of Greater Buffalo
Elmira Jewish Welfare Fund Jewish Federation of Greater Kingston
JCRC of New York
United Jewish Federation of Northeastern New York
Jewish Federation of Greater Orange County
Jewish Community Federation of Rochester
Syracuse Jewish Federation
Utica Jewish Federation

Ohio

Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
CRC of the Columbus Jewish Federation
JCRC of the Jewish Federation of Greater Dayton
CRC of the Jewish Federation of Greater Toledo
JCRC of Youngstown Area Jewish Federation

Oklahoma

Jewish Federation of Greater Oklahoma City
Jewish Federation of Tulsa

Oregon

Jewish Federation of Portland

Pennsylvania

CRC of the Jewish Federation of Allentown
Erie Jewish Community Council
CRC of the United Jewish Federation of Greater Harrisburg
JCRC of Greater Philadelphia
CRC of the United Jewish Federation of Pittsburgh
Scranton-Lackawanna Jewish Federation
Jewish Federation of Greater Wilkes-Barre

Rhode Island

CRC of the Jewish Federation of Rhode Island

South Carolina

Charleston Jewish Federation
Columbia Jewish Federation

Tennessee

JCRC of the Memphis Federation Council
Jewish Federation of Nashville and Middle Tennessee

Texas

Jewish Federation of Austin
Jewish Federation of Greater Dallas
JCRC of the Jewish Federation of El Paso
Jewish Federation of Fort Worth and Tarrant County
CRC of the Jewish Federation of Greater Houston
JCRC of the Jewish Federation of San Antonio

Virginia

United Jewish Community of the Virginia Peninsula
Jewish Community Federation of Richmond
United Jewish Federation of Tidewater

Washington

Jewish Federation of Greater Seattle

Wisconsin

Madison Jewish Community Council
Milwaukee Jewish Council

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*"CRC" – Community Relations Committee or Council; "JCRC" – Jewish Community Relations Council

APPENDIX I: THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES

The National Organization Of Black Law Enforcement Executives ("NOBLE") is a non-profit organization of police chiefs, agency heads, command-level law enforcement officials and criminal justice educators whose membership is numbered at approximately 2400. NOBLE's goals are to develop, implement and manage innovative ideas, concepts and programs aimed at reducing violence, crime, and the elimination of racism in the criminal justice arena. NOBLE was founded in September, 1976, during a three day symposium co-sponsored by the Police Foundation and the Law Enforcement Assistance Administration (LEAA).

Consistent with its motto, "Justice by Action," NOBLE aggressively pursues its goalsz by conducting substantive research, speaking out on the issues and performing a variety of outreach activities. NOBLE's success in this arena is reflected by its growth and the major role it has played, and continues to play, in shaping policy in areas of vital importance to minorities and the law enforcement community. NOBLE has effectively used the judicial process and direct correspondence to express opinions and concerns. NOBLE has endorsed strategies that provide a holistic approach to crime and violence and proactive policy- community involvement.

What has come to be known as hate violence, racial and religious violence and harassment was first researched by NOBLE in 1983. NOBLE received funding from the National Institute of Justice (NIJ) to do research on the problem and to develop model policies and procedures for law enforcement agencies.

As a result, NOBLE published a law enforcement handbook that outlines a model response to racial and religious violence which is used broadly by the law enforcement community and social service practitioners. NOBLE provided education and advocacy that resulted in the passage of federal legislation requiring the collection of data on the occurrence of hate violence incidents. With a grant from the Ford Foundation,

NOBLE has drafted a training program and produced a videotape for law enforcement workers on racial violence entitled *Hate Crime: a Policy Perspective* aimed at training police officers in effective procedures for handling hate crimes. In addition, NOBLE has developed a training curriculum to deal with cultural clashes on college campuses. The curriculum is designed to sensitize college administrators, students and law enforcement personnel to the issue of racism.

Consequently, NOBLE joins the ADL in urging the Court to grant Certiorari in State v. Mitchell and *State v. Wyant*.

APPENDIX J:
THE ORGANIZATION OF CHINESE AMERICANS

Founded in 1973, The Organization of Chinese Americans, Inc. ("OCA") is one of the largest national Chinese American organizations seeking equal rights and equal protection under the law. With 42 chapters nationwide and over 5,000 members, OCA is committed to developing the full participation of Asian Americans in the American political process.

Due to the increasing incidence of anti-Asian violence, OCA has worked extensively with other organizations toward the elimination of hate crimes through legislative, educational, and community efforts. Based on OCA's concern for civil rights, we join in urging the court to grant the petitions for the writ of Certiorari.

APPENDIX K:
THE POLICE EXECUTIVE RESEARCH FORUM

The Police Executive Research Forum ("PERF") is a national organization of police executives from large- and medium-sized jurisdictions dedicated to promoting progressive policing through research, education, debate and national leadership.

Because of our commitment to protecting all persons equally under the law and the devastation that hate crimes can wreak on victims and their communities, PERF believes that the police community should aggressively seek out and respond to bias crime incidents. One tool police in 31 states now have to combat hate crime is the penalty enhancement statute. Penalty-enhancement statutes send a strong message to the public that law enforcement authorities take hate crimes very seriously and that perpetrators will face considerable punishment. We believe that penalty-enhancement statutes, when used as part of a comprehensive approach to hate crime, are effective and important tools – tools that are now in question as a result of the rulings in *State v. Mitchell* and *State v. Wyant*.

APPENDIX L:
THE SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center is a non-profit organization founded in 1971 to protect the rights of poor people and minorities. Its attorneys have litigated numerous human and civil rights cases in federal and state courts across the country, including cases focusing on racial and sexual discrimination, voting rights, capital punishment, and racial violence.

In 1979, the Center established the Klanwatch Project to monitor the activities of white supremacist organizations and individuals throughout the United States. Klanwatch has been instrumental in providing federal and state law enforcement authorities with substantial assistance in combatting and prosecuting hate crimes and has developed the largest intelligence base on white supremacist groups that exists in this country. Using that data base, the Center itself has brought many successful civil lawsuits against white supremacist groups and their members. *See, e.g., Berhanu v. Tom Metzger, et al.,* No A-8911-07007 (Ore. Cir. Ct.) (civil section against the White Aryan Resistance and its leaders and agents for the beating death of an Ethiopian student in Oregon); *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (criminal contempt proceeding against Klan members violating a court order against paramilitary activities); *McKinney v. Southern White Knights*, No C87-565-CAM (N.D. Ga. 1988) (civil action against Klan groups and individuals for assaulting peaceful civil rights marchers); *Donald v. United Klans of America*, No. 84-0725 (S.D. Ala. 1987) (civil action on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F.Supp. 993 (S.D. Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

The Southern Poverty Law Center is deeply concerned about the steady rise in hate crimes by various fringe groups and white supremacist organizations, and believes that the interest of law enforcement would be greatly served by the Court's grant of *certiorari* in this case to resolve the uncertainties created as a result of the decision in *R.A.V. v. City of St. Paul, Minnesota,* ___ U.S. ___, 112 S. Ct. 2538 (1992).

APPENDIX M:
THE UNITED STATES CONFERENCE OF MAYORS

The United States Conference of Mayors is a not-for-profit organization organized under the laws of the State of Illinois, with its offices in Washington, D.C. The organization represents approximately 1,000 mayors of cities with a population of over 30,000, assuring that the interests of cities are represented in the development of national public policy and providing information and assistance to mayors and other city officials on a variety of urban issues.

The United States Conference of Mayors joins the ADL in urging the Court to grant Certiorari in *Mitchell* and *Wyant*.

No. 92-515 (40)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF OHIO IN SUPPORT OF RESPONDENT

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I. INTEREST OF *AMICUS*[1]

The American Civil Liberties Union of Ohio ["ACLU of Ohio"] is an affiliate of the American Civil Liberties Union ["National ACLU"], a nonprofit, nonpartisan organization, whose thousands of members are dedicated to the principles of liberty and equality embodied in the Bill of Rights.

Since their founding in 1920, the Ohio and National ACLUs have been zealous advocates of the First Amendment and steadfastly have opposed government efforts to regulate free speech and thought, no matter how well intentioned those efforts might be. This commitment to free speech has led both the Ohio and National ACLUs to defend numerous clients whose political ideologies are abhorrent to most members of the organizations. We have done so, nonetheless, because of our belief that civil liberties are indivisible, and that free speech rights cannot be granted to some and denied to others. For these reasons, the ACLU of Ohio successfully has challenged the Ohio ethnic intimidation statute as unconstitutional on its face. *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992), *petition for cert. filed* (No. 92-568).

The ACLU's commitment to free speech has always stood side-by-side with a commitment to equal protection of the laws. Thus, throughout their history, the Ohio and National ACLUs consistently have argued in this and other courts in favor of antidiscrimination laws. However, there are times when the reconciliation of conflicting values of freedom of expression and equal protection is very difficult—and individuals and organizations may, in good faith, differ on that resolution.

The National ACLU has filed an *amicus* brief arguing that reversal of the Supreme Court of Wisconsin's decision is consistent with First Amendment principles. The ACLU of Ohio, by vote of its Board of Directors, has concluded that the National ACLU has accorded insufficient weight to First Amendment values. The ACLU

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

of Ohio urges the Court to affirm the judgment of the Supreme Court of Wisconsin. We believe that Todd Mitchell was punished for *acting* on his beliefs when he received the first two years of his sentence, and when he was given an additional two years, he was punished for his thoughts (and words) themselves. Because this case raises such fundamental and profound constitutional issues, we submit this brief as *amicus curiae* to offer the Court the benefit of our views.

II. STATEMENT OF THE CASE

On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha, Wisconsin. Nineteen-year-old Todd Mitchell was one of the older members of the group. Some of the group were at one point discussing a scene from the film "Mississippi Burning," where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.

The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. Other than the words he used to exhort his friends, there is no indication that Mitchell participated in the beating. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates that he suffered extensive injuries, including possible brain damage.

Mitchell was convicted of aggravated battery, party to a crime under WIS. STAT. §§ 939.05 and 940.19(1m) (1982). The jury separately found that Mitchell had intentionally selected Reddick as

the battery victim because of Reddick's race. The aggravated battery conviction carried a maximum sentence of two years. Because the jury found that Mitchell had selected Reddick because of Reddick's race, the hate crime statute, WIS. STAT. § 939.645, increased the potential maximum sentence for aggravated battery to seven years. The trial court sentenced Mitchell to four years for the aggravated battery.

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crime statute. On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crime statute was neither vague nor overbroad. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991).

The Wisconsin Supreme Court granted Mitchell's petition for review on the issue of the constitutionality of the hate crime statute. On June 23, 1992, the court reversed the decision of the state appellate court and held that the statute was unconstitutional. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992). This Court granted the State of Wisconsin's petition for a writ of certiorari on December 14, 1992.

III. SUMMARY OF ARGUMENT

Few issues in recent times have engendered more division among members of the so-called liberal community than those surrounding "hate crime" legislation. Such laws, of which WIS. STAT. §939.645 (1989-90)["the statute" or "the hate crime law"] is an exemplar, were enacted in response to reports that prejudice-related crimes were increasing. The purpose underlying these laws is a noble one which groups such as the ACLU of Ohio have long embraced: the prevention of crimes perpetrated against members of disadvantaged groups solely because of their immutable characteristics or their beliefs. It is the means chosen to achieve this goal which have shattered typical liberal alliances, leading to anomalies such as that extant in the ACLU of Ohio filing this brief urging affirmance of the

Wisconsin Supreme Court, at the same time that the National ACLU has filed a brief on the opposite side. *See* Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioner [hereinafter "National ACLU Brief at ____"].

The members of the ACLU of Ohio feel no less strongly than our associates at the National ACLU that crimes perpetrated against minorities and other disadvantaged groups are reprehensible and should be severely punished. However, we diverge from the national organization because of our belief, borne out by experience with Ohio's recently invalidated ethnic intimidation statute, that laws such as Wisconsin's are conceptually infirm at their root: they seek to prevent harms to certain groups indirectly, via the mind and words of the alleged perpetrator. In the view of the ACLU of Ohio, such a "detour" is not constitutionally permissible, particularly in light of the fact that the conduct which is properly the object of state sanctions is already punished under generally applicable laws.

The State and its *amici* seek to persuade this Court that the hate crime law punishes conduct, the "act" of intentionally selecting a victim because of one of the forbidden criteria. However, this is no more an "act" than is the decision to purchase a particular item of apparel from a clothier: the actual purchase is the part of the transaction which might be characterized as an act, while the "selection" of the garment is shorthand for a complex variety of mental processes that have few outward, reliable manifestations. The Wisconsin Supreme Court correctly concluded that the hate crime law, with its focus on the defendant's "intentional selection," necessarily involves inquiry into, and punishment of, his subjective motives or reasons for singling out the object of criminal conduct.

Such motivating thoughts may not be punished separately by the State. First, motive, defined as the reason "why" an individual engages in specific conduct, is difficult if not impossible to ascertain in a manner reliable enough to support the imposition of harsh criminal penalties. The second reason why motive may not be separately punished by the government stems from the First Amendment itself: government may not selectively punish those motivating beliefs of which it approves and ignore others. For example, if Wisconsin may increase the penalty for only those batteries in which

the perpetrator selected his victim because of that person's religion, then it could just as properly choose to eliminate the penalty for those batteries which were motivated by the religion of the victim. If this selection among motivating beliefs is deemed to be a proper function of government, it is not difficult to envision how hate crime statutes could be used to suppress unpopular viewpoints.

However, even if the hate crime law is deemed to reach conduct rather than thoughts and beliefs, it is unconstitutionally overbroad. The statute, which elevates the criminal penalty for virtually every act of criminal conduct when it is prompted by "improper" motives, sweeps within its ambit a great deal of protected activity and therefore should not be sustained.

Finally, in urging reversal of the Wisconsin decision, the State and its *amici* contend that unless the hate crime law is upheld, the panoply of state and federal antidiscrimination statutes will be threatened with invalidation. This argument is not well taken for several reasons. First, it is hardly a sound principle of constitutional adjudication to base determinations about the constitutionality of one statute on the possible effect its invalidation will have on other statutes not under consideration by the Court. Moreover, the concerns voiced by the proponents of the hate crime law are unrealistic because none of the laws which they contend are jeopardized by this case levy criminal penalties on motive itself, distinct from the underlying conduct sought to be discouraged. The only situations in which conventional antidiscrimination laws consider motive at all are those in which there is an essential nexus between motive and the conduct sought to be prohibited. No such nexus is found in the hate crime law since the underlying conduct, by definition, is already punished regardless of whether the state approves of the actor's motive. Consequently, invalidation of the hate crime law will not result in the wholesale loss of state and federal antidiscimination statutes.

IV. ARGUMENT

A. The First Amendment Prevents Government from Imposing Substantial Criminal Penalties Solely on Motives, Where the Ends Sought to be Achieved May be Accomplished Through the Less Restrictive Means of Punishing Conduct.

1. The Wisconsin hate crime law punishes thought and speech, not conduct.

The Wisconsin Supreme Court correctly concluded that the hate crime law, Wis. Stat. § 939.645(1)(b), implicates and infringes on First Amendment protections of thought and speech. The court construed the statute as reaching, not action, but the thoughts and accompanying expression which comprise a perpetrator's "subjective motivation" in the selection of a particular person against whom criminal conduct is carried out. *State v. Mitchell*, 485 N.W.2d 807, 814 (Wis. 1992). In simple terms, the *Mitchell* court held that the "hate crime" law was invalid because, while the state can and should punish "crime," *i.e.*, the underlying injurious conduct, it cannot separately punish "hate," namely, the evil feelings which motivated the perpetrator to act against a member of a particular group.

The focal point of the Petitioner's attack on the decision below is the court's conclusion that the statute sanctions thought and speech. The State contends that the hate crime law punishes not belief and expression, but conduct which has a "dual nature," consisting of "criminal conduct" combined with "the discriminatory motive of the actor" in selecting a particular victim. Brief of Petitioner at 8. Thus, Wisconsin argues, this case is not governed by *R.A.V. v. City of St. Paul*, 505 U.S. ___, 112 S. Ct. 2538 (1992), because the ordinance at issue there proscribed expression based on content, whereas the hate crime law "does not on its face, or in effect, proscribe expression, beliefs, or thought." Brief of Petitioner at 10.

However, as the Wisconsin Supreme Court noted, by punishing the mental processes underlying the defendant's intentional selection of a target for illegal actions, the statute proscribes the

motive or reason behind the selection—in short, the thoughts and beliefs that impelled the defendant to act. *Mitchell*, 485 N.W.2d at 812. Indeed, if we compare the expressive conduct of the defendant in *R.A.V.* to the "conduct" for which Mitchell is being punished, Mitchell's is far more akin to speech. Mitchell did not engage in the beating of the white victim; his involvement consisted of discussing the film "Mississippi Burning," and his admonition to his cohorts to "move on some white people" and to "go get [a white boy.]" *Id.* at 809. Mitchell received a two-year sentence for uttering these words, and an additional two years under the hate crime law solely for the bigoted thoughts which impelled him to speak. By contrast, the defendant in *R.A.V.* actually burned a crudely-made cross inside the fenced yard of a black family. 112 S. Ct. at 2541. Although the City of St. Paul in *R.A.V.* conceded that the burning of a cross does express a message, *Id.* at 2548, surely the defendant's actions in that case were much closer to conduct than were the thoughts and words for which Mitchell was punished. Thus, the efforts of the State and its *amici* to distinguish *R.A.V.* by asserting that it dealt with speech, while this statute clearly punishes "criminal conduct," *e.g.*, Brief of Petitioner at 7, are unpersuasive.

The Ohio Supreme Court rejected a similar argument in *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992), *petition for cert. filed* (No. 92-568), a decision overturning Ohio's ethnic intimidation statute[2] on state and federal constitutional grounds. It was *Wyant*, and the other cases with which it was consolidated, which initially demonstrated to the members of the ACLU of Ohio the dangers to civil liberties posed by hate crime statutes. In *Wyant*, the white defendant became involved in a verbal dispute with a group of blacks at a state park. After being asked by park officials to turn down his radio, Wyant was heard to say, "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black motherfucker," and "I ought

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[2] Ohio's ethnic intimidation statute enhanced the penalty for various specified criminal actions done "by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code Ann. § 2927.12 (Anderson 1987). Wisconsin's statute, by contrast, enhances criminal penalties for certain actions where the actor "intentionally selects" the person or property against whom the crime is committed "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of that person or the owner of the relevant property. Wis. Stat. § 939.645 (1989-90).

to kick his black ass." *Id.* He was indicted and convicted on one count of ethnic intimidation, predicated on the less serious crime of aggravated menacing, and sentenced to eighteen months imprisonment. *Id.*

In *Wyant*, the State of Ohio argued, precisely as Wisconsin does here, that the hate crime statute punished conduct, since its enhancement provision was triggered only after the defendant had been impelled to carry out a criminal act against another. The court unanimously rejected this contention, noting that "the enhanced penalty results solely from the actor's reason for acting, or his motive." *Id.* at 453. In a carefully reasoned opinion, the court concluded that the punishment of motive separately from the underlying acts which are already proscribed violates the expressive freedoms guaranteed by the Ohio and United States constitutions:

> The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes. The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.
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> . . .
>
> By enacting [the hate crime statute] the state has infringed on [the] basic libert[ies of thought and speech]. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?

Id. at 457 (footnote omitted).

The Wisconsin statute is worded differently than the Ohio law invalidated in *Wyant* inasmuch as it punishes the "intentional selection" of a person or property against whom a crime is committed because of the race, etc., of the victim or the owner of the property. However, the Wisconsin hate crime law unquestionably criminalizes

the thoughts and motives of a person who has engaged in otherwise proscribed conduct. The Wisconsin Supreme Court construed the hate crime law as "punishing offensive motive or thought," since an examination of the intentional "selection" of a victim "necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." *Mitchell*, 485 N.W.2d at 813. Indeed, the State and its *amici* concede as much but argue that motive may properly be singled out for distinctive punishment by the legislature once the motive prompts a person to engage in proscribed conduct.

The argument advanced by the National ACLU in its *amicus* brief is typical of this reasoning (though not, we believe, of the libertarian principles traditionally championed by the ACLU):

> Respondent is facing an additional two years in prison because he deliberately chose the victim of his assault on the basis of race. *Until he engaged in this discriminatory behavior, respondent was free to think and say whatever he wished.* Once he engaged in this discriminatory behavior, respondent crossed a crucial constitutional line.

National ACLU Brief at 8 (citations omitted)(emphasis supplied).

This Court has never suggested that a person's freedom to think and say whatever he wishes disappears once the "crucial constitutional line" of "discriminatory behavior" is crossed. Even bigots who are so benighted as to act on their loathsome beliefs do not thereby forfeit the protections of the First Amendment. Thought and speech do not lose their constitutionally preferred status because one, at the same time, has participated in conduct that is itself unprotected. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908-17 (1982) (right to associate does not lose constitutional protection because some members of the group may have engaged in violent conduct, though violence itself can be punished). Prisoners who have been duly convicted of the most heinous crimes and incarcerated in prison retain all First Amendment freedoms that are not incompatible with imprisonment. *Bell v. Wolfish*, 441 U.S. 520, 545 (1978); *Pell v. Procunier*, 417 U.S. 817, 822 (1973).

The State seeks to avoid the implications of these principles by arguing that discriminatory motive is really a type of "conduct," rather than thought or speech. According to this argument, the criminal law is constantly engaged in evaluating and punishing the motive which impels individuals to act, and the First Amendment does not affect these inquiries. However, motive, as distinct from intent and purpose which affect the nature of the criminal act itself, is not properly a subject of criminal sanctions. WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.6 (2d ed. 1986) (narrowly defined to exclude "intent" and "purpose," "motive" is not relevant to substantive criminal law).[3] This is true for at least two reasons.

First, motive, defined as the reason "why" a person engages in specific conduct, is difficult or impossible to ascertain in any reliable way. This problem is apparent even in the arguments advanced by those who support the statute. For instance, the National ACLU suggests that it is neither fruitful nor necessary to make murky inquiries into motive because Mitchell's reasons for acting remain a mystery. National ACLU Brief at 12. According to the National ACLU, Mitchell may have "used racial rhetoric" to spur others on out of a desire to steal Reddick's tennis shoes, not out of "genuine racist feeling." *Id.* It then argues that this uncertainty is not significant because all that need be shown to establish a violation of the hate crime law "was that Mitchell acted on the basis of race." This is a non sequitur. If Mitchell could have established that his motive was not racial animus, then he would not have violated the hate crime law: his selection of Reddick would not have been "because of the race . . . of that person," but "because of the tennis shoes" of that person.

[3] The distinction between motive, purpose, and intent is explained by Professors LaFave and Scott as follows:

> [I]t is undoubtedly better, for purposes of analysis, to view [specific intent] crimes as *not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when A breaks into B's house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive.

WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.6 at 228 (2d ed. 1986).

Members of this Court have long recognized the difficulties inherent in making determinations about motive, even within the context of reasoned legislative debate. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court considered whether Congress, in amending the Universal Military and Training and Service Act of 1948, to prohibit the knowing destruction or mutilation of draft cards, had acted with a desire to suppress free expression. There were indications that at least some legislators may have been motivated by a desire to stem the "defiant" destruction of the draft cards and the open encouragement of others to do the same. *Id.* at 385-86. However, the Court refused to inquire into the legislature's motives in passing the amendments:

> Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 384. *See also Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. and Rehnquist, C.J., dissenting) (criticizing prong of *Lemon* test which evaluates legislative purpose because "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task"). Surely, with two years of his life on the line, the stakes for Mitchell are high enough that the State must eschew imposing criminal penalties on him because of guesswork about whether he selected Reddick on the basis of race or the brand of tennis shoes Reddick was wearing.

The second reason why motive may not be separately punished by the government has a constitutional basis: the First Amendment prevents the government from selectively punishing some motivating beliefs and not others. As Justice Scalia wrote in *R.A.V.*, a criminal statute designed solely to display the government's "special hostility towards the particular biases thus singled out" is "precisely what the First Amendment forbids." 112 S. Ct. at 2550 (footnote omitted). If the government were not required to maintain a posture of epistemological humility with respect to even the most repulsive motivating beliefs, unpopular views could be effectively

suppressed. For instance, if Wisconsin may increase the penalty for batteries in which the perpetrator selected his victim because of that person's religion, then it may also *mitigate or eliminate* the penalty for batteries in which the perpetrator selected his victim because of that person's religion. In principle, the statutes would be equivalent, the only difference being the legislature's perspective on which motives for battery are most acceptable. If it is deemed proper for government to select among those motivating beliefs which it desires to punish the most heavily, the First Amendment, in many respects, will have ceased to function as a protection against the government prescribing orthodoxy of thought.

This Court has refused to permit the government to impose penalties solely on disapproved motives. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court declared the Texas flag desecration law unconstitutional because it punished conduct only when it was done to offend others, in other words, when it was prompted by improper motives. Congress attempted to overcome this problem by passing the Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. 1992), which purported to proscribe conduct "without regard to the actor's motive." *United States v. Eichman*, 496 U.S. 310, 315 (1990). But the Court rejected the new federal law as well on First Amendment grounds. The Court noted that, with the possible exception of "burns," the terms for the so-called "conduct" that was prohibited— "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples"— "unmistakably connote disrespectful treatment of the flag." *Id.* at 317. The Act failed to pass constitutional muster because it penalized the actor's beliefs and motives, in violation of the First Amendment.

In essence, the State and its *amici* invite this Court to hold that once certain proscribed conduct occurs, the line between actions and beliefs disappears and the government may delve into and separately punish whatever motives are determined to have prompted the conduct. That is obviously why the State, in prosecuting this action, offered evidence that Mitchell and his friends had been watching the film "Mississippi Burning" and had discussed a scene in which a white man beat a young black boy who was praying. *Mitchell*, 485 N.W.2d at 809. By the same reasoning, it also would have been relevant to Mitchell's prosecution that he had gone to see the film

"Malcolm X" the day or week before, or that he had repeatedly expressed the opinion that only through violence would blacks ever achieve equality in a racist society. Once the distinction between thought and conduct disappears, there is no principled stopping point.

In its *amicus* brief, the National ACLU acknowledges these obvious dangers to thought and expression posed by the Wisconsin hate crime statute. It admits that the statute is "easily susceptible to prosecutorial abuse," and may become "a vehicle for the suppression of unpopular ideas." National ACLU Brief at 20. Thus, although the National ACLU ostensively defends the Wisconsin statute as it is written, it actually urges this Court to reinstate a modified version of the hate crime law, engrafted with extensive constitutional caveats and guidelines designed to limit the evidence that could be used in prosecuting hate crime violations. *Id.* at 20-23.

What the National ACLU fails to recognize is that, once it is established that motivating beliefs may be singled out for punishment consistent with the First Amendment, it is arguably not "abuse," but proper *diligence* for a prosecutor to offer evidence of the defendant's racist associations or reading habits. If hate crime laws are constitutional, prosecutors and law enforcement officials would have a responsibility to inquire into all evidence that pertains to whether the victim of particular conduct was intentionally selected because of that person's race or religion. In the instant case, it is a film viewed by the defendant that the state seeks to consider in punishing him. Unless the First Amendment prevents such governmental action, there is no reason why, in the next case, the prosecution would not evaluate the defendant's library, associations, or writings.

In the view of the ACLU of Ohio, the First Amendment permits Mitchell to be punished for his actions, but not for his bigoted, motivating thoughts. The "crucial constitutional line" correctly recognized by the Wisconsin Supreme Court is the line dividing conduct from motivating thoughts and beliefs, which are not proper objects of governmental sanctions. We urge this Court to reaffirm this vital distinction.

2. The Wisconsin hate crime law is not narrowly tailored to further a compelling governmental interest.

The relevant standard of review in this case depends on the nature of the interest regulated by the state. As the preceding section indicates, the Wisconsin Supreme Court correctly construed the hate crime law as being "expressly aimed at the bigoted bias of the actor." *Mitchell*, 485 N.W.2d at 813. Moreover, this Court has indicated that it considers itself bound by the authoritative construction of a state supreme court concerning the reach of a state statute. *R.A.V.*, 112 S. Ct. 2538, 2542 (1992). Thus, the importance of Wisconsin's interest, and the extent to which the hate crime law furthers that interest, must be subjected to "the most exacting scrutiny."[4] *Texas v. Johnson*, 491 U.S. 397, 412 (1989). Typically, strict scrutiny is characterized as looking at whether the statute is narrowly tailored to further a compelling governmental interest.

There are several interests that are conceivably advanced by the hate crime law. First, there is the interest identified by the Wisconsin Supreme Court: "[t]he statute commendably is designed to punish—and thereby deter—racism and other objectionable bi-

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[4] Wisconsin may not avoid the operation of strict scrutiny by arguing that the hate crime law only incidentally regulates thought and expression, thereby satisfying the less stringent standard of *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, this Court held that a substantial governmental interest in regulating conduct can justify "incidental" limitations on First Amendment freedoms, as long as the state interest is unrelated to the suppression of expression and the restriction is no greater than is necessary to further that interest. *Id.* at 376-77. Thus, O'Brien could be punished for burning his draft card, even though he had burned it in order to express his displeasure with the war in Vietnam, because the aim of the statute was to ensure the smooth operation of the selective service system, not to suppress anti-war protests.

In the instant case, Mitchell's prosecution for battery is analogous to the prosecution at issue in *O'Brien*. Because of *O'Brien*, Mitchell cannot claim exemption from the state's battery law because it incidentally results in his being punished for his words urging violence against Reddick. However the hate crime statute is directly aimed at something more than conduct: the thoughts which prompted Mitchell to act. Thus, the governmental interest is in promoting certain thoughts and beliefs about race and the *O'Brien* test does not apply. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

ases." *Mitchell*, 485 N.W.2d at 814. Plainly, as the Wisconsin court ultimately concluded, *Id.*, that state interest is an impermissible one since government may not mandate one view of racial relations and punish others. *R.A.V.*, 112 S. Ct. at 2550; *see also Texas v. Johnson*, 491 U.S. at 415. As Judge Easterbrook noted in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), "[a]ny other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."

The State of Wisconsin recasts this interest slightly when it argues that it must also impose additional penalties in order to deter the "actual degree of depravity" of Mitchell's crime. Brief of Petitioner at 21. According to the State, Mitchell's crime was "doubly depraved:" it was wrong as an act of violence and "additionally wrong as a violent act of discrimination." *Id.* However, examination of this interest reveals that it is merely viewpoint discrimination in another form. Mitchell's discriminatory motive was "depraved" because of Wisconsin's attitude toward racial bigotry. If Mitchell had battered Reddick's sister because of her gender, a category omitted from the hate crime statute, no such "double depravity" would have been present and Mitchell could only have been punished for his act of violence. The "depravity" Wisconsin seeks to punish thus stems solely from governmental hostility toward particular racist views, an interest that is not permissible under the First Amendment.

Finally, the most defensible interest which the State might assert, and one implicit in all discussions of hate crime statutes, is that of prohibiting crimes against members of groups which have historically, and are presently, frequent targets of violent conduct. Since African-Americans, Jews, and other minorities in this country have often been singled out for attacks by violent bigots, the State may be presumed to have a compelling interest in preventing crimes against these groups. However, the hate crime law is not narrowly tailored to advance such an interest.

The hate crime law only indirectly reaches attacks on particularly vulnerable victims: the statute's primary prohibition is against bigoted motives. As the instant case illustrates, the statute may be employed as readily *against* members of traditionally disadvantaged

groups as on their behalf. What we have here, as this Court noted in *R.A.V.*, is not a prohibition against conduct that is "directed against certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause);" but rather a prohibition against " 'bias-motivated' hatred." that leads to conduct. 112 S. Ct. at 2548. Because the state's interest in preventing violent acts against vulnerable persons or groups could be directly advanced by a content-neutral statute focusing on conduct, the state may not attempt to advance this interest indirectly, by punishing the bigoted thoughts motivating that conduct.

3. The Wisconsin hate crime law is unconstitutionally overbroad because it reaches a substantial amount of protected expressive conduct and could readily be used to silence unpopular viewpoints.

A law is unconstitutionally overbroad when it "does not aim specifically at evils within the allowable area of governmental control, but . . . sweeps within its ambit other activities that constitute an exercise of protected expression or associational rights." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Obviously, the ACLU of Ohio considers the hate crime law to be panoramically overbroad because we believe that it aims at punishing bigoted motives and beliefs, which are protected under the First Amendment. However, even if one were to conclude that the statute reaches conduct rather than thought and expression, the statute still would proscribe a substantial amount of protected activity.

The hate crime law elevates the penalty for practically every offense in the Wisconsin Criminal Code, from "criminal trespass," WIS. STAT. § 943.13 (1982), to "adultery," WIS. STAT. § 944.16 (1982). Thus, the statute creates a de facto anti-miscegenation statute by increasing by up to $5,000 and five years imprisonment the criminal penalty for engaging in sexual intercourse with a married person "because of" the race or color of that person (there is no requirement under the statute that race be the sole, or even predominant motive). WIS. STAT. §§ 939.645 (1989-90) and 944.16 (1982). *C.f. Loving v. Virginia*, 388 U.S. 1 (1967) (striking down anti-miscegenation statute on equal protection grounds).

Likewise, the hate crime law readily could be applied to trespassing protesters who happened to have selected the site of their march because of one of the proscribed categories of motivations. For example, gay activists or pro-choice marchers who selected a particular Milwaukee Cathedral in order to protest the Catholic Church's teachings pertaining to homosexuals or abortions could have their criminal trespass penalties enhanced by up to $10,000, and one year imprisonment under the hate crime law, since they selected the property on which they trespassed because of the religion of the owner.

To consider the hate crime law in a historical context, if a version of the Wisconsin statute had been in effect in the segregated South during the Civil Rights movement, those who marched for integration and equality would have suffered even greater hardships. Certainly, penalties imposed on civil rights marchers could have been enhanced in most instances, since it would not have been difficult for authorities to show that protesters were motivated by the race, religion, or the political beliefs of their "victims."

These are only a few examples of the protected conduct which the hate crime law potentially reaches and thereby "chills." If Wisconsin wishes to legislate in sensitive areas pertaining to bigotry, it must do so thoughtfully and carefully, taking care not to punish or dissuade protected activities. The hate crime law is far too imprecise to accomplish this delicate task.

B. Invalidation of the Wisconsin Hate Crime Law Will Not Call into Question Federal and State Antidiscrimination Laws, Which Employ Narrowly Tailored Means to Prevent Discrimination in the Marketplace.

Although it is evident that the Wisconsin statute is constitutionally impermissible on First Amendment grounds, one of the arguments urged most strenuously by the State and its *amici* is that, if the hate crime law is found unconstitutional, a host of state and federal antidiscrimination laws would also be invalidated. The argument that the Wisconsin hate crime law must be upheld lest the legion of federal and state antidiscrimination laws also fail is problematic at best.

Deciding the constitutionality of the statute based on the possible unconstitutionality of other statutes not before this Court is a questionable fundament. Nonetheless, because of the prevalence of concerns about the continuing validity of antidiscrimination laws in the wake of *Mitchell*,[5] the merits of such concerns will be addressed.

1. Antidiscrimination laws are narrowly tailored to prohibit objectively identifiable acts of discrimination, while the hate crime law punishes discriminatory motive.

The *Mitchell* majority correctly concluded that the hate crime law was invalid because it punishes the mental processes and thoughts of the alleged perpetrator. 485 N.W.2d at 817. In contrast, antidiscrimination laws target and prohibit the discriminatory act. *Id.* In *State v. Wyant*, the Ohio Supreme Court elaborated on this distinction. Justice Brown conceded that federal and state laws against discrimination in employment, housing, education, and other areas do proscribe acts committed with a discriminatory motive. 597 N.E.2d at 456. Nonetheless, he found that, because the *act* of discrimination is targeted by antidiscrimination laws, not the motive of the actor, these laws analytically are distinct from hate crime statutes. *Id.* Indeed, "[i]t is the discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*" of the perpetrator which is targeted. *Id.*

As this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), regarding Title VII protections against discriminatory employment practices, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (emphasis in original). Bigoted motivation itself is not punished by antidiscrimination statutes as it is by the Wisconsin hate crime law. Nor does proof of motivation enhance the penalty under antidiscrimination laws when a discriminatory act is manifest. Rather the *act* of discrimination identified through objectively verifiable conduct, not the disfavored thoughts of the actor, is proscribed and penalized.

Antidiscrimination laws focus on the denial of an opportunity for housing, employment, or education, rather than the discriminatory motive of the actor. The nexus between the regulated conduct and discriminatory motive under these laws is so tight as to nearly merge the motive into the act and make the two interdependent, in order to create *any* illegality. In other words, the motive is essential to make an otherwise neutral act punishable. *See generally,* Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 1991 BROOKLYN L.REV. 1107, 1139-40. The only way for government to reach the underlying neutral act of denying housing, employment, or education is to couple the act with a discriminatory motive, in which case the two elements become inextricably combined. The tight nexus between the motive and the objectively verifiable conduct underlies the validity of these laws.

The redressability of conduct that is coupled with a discriminatory motive under antidiscrimination laws is akin to situations arising under the rule of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, the government may regulate conduct while only incidentally limiting First Amendment interests, so long as the state's interest is "unrelated to the suppression" of expression. *Id.* at 377. Because the state interest underlying antidiscrimination laws is to remedy the effects of past discrimination in the marketplace felt by traditionally disadvantaged groups,[6] not to suppress expression, the state can punish these acts, while only incidentally touching the discriminatory motive or thought of the actor.

The only way to reach invidious discrimination in the marketplace is through the narrowly tailored means of punishing the conduct that is accompanied by a discriminatory motive. While discriminatory motive is essential to making the act of denying employment, housing, or education punishable, the intrusion on the expressive element of such conduct is only slight, and it is the denial of

[5] In *Mitchell*, Justice Bablitch posed the question, "How can the Constitution not protect discrimination in the marketplace when the action is taken 'because of' the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken 'because of' the victim's status?" *State v. Mitchell*, 485 N.W.2d 807, 820 (Wis. 1992) (Bablitch, J., dissenting).

[6] *See* Brief of Petitioner at 31 where the State concedes that antidiscrimination laws are primarily remedial in nature.

opportunity that is redressed by these statutes, rather than the motives of the actor. This is permissible because no adequate content-neutral civil alternatives exist for remedying discrimination in the workplace, housing market, or educational institution. *See R.A.V. v. City of St. Paul*, 505 U.S. ___, 112 S. Ct. 2538, 2550 (1992).

The Wisconsin hate crime law, however, is not narrowly tailored to serve what would seem to be the State's most compelling interest: preventing harmful actions against historically disfavored persons or groups. Wisconsin seeks to advance this interest indirectly, by punishing the discriminatory motive, or hate, of the alleged perpetrator. Such a detour through the mind or words of another is constitutionally impermissible in view of the fact that the underlying conduct is already punishable under content-neutral criminal laws.

Unlike antidiscrimination laws, where the nexus between motive and act is so tight as to make the two interdependent in order to create *any* illegality, the nexus under the hate crime law is much more distant. Indeed, the alleged perpetrator of a hate crime can properly be punished for his actions alone under the content-neutral criminal statute, without reaching discriminatory motive. The existence of an independent discriminatory motive is not essential to the punishability of the underlying conduct. By contrast, the punishment of discrimination in the marketplace depends on a close fit between motive and otherwise lawful conduct.[7]

The State has in place content-neutral criminal codes that already proscribe the behavior targeted by the hate crime law; thus it is difficult to delineate any special interest fostered by the hate crime statute. The criminal codes, which are not limited to the favored factors, achieve the beneficial result of preventing the proscribed conduct. *See R.A.V.*, 112 S.Ct. at 2550. Indeed, "the only interest distinctly served by the content limitation [of the Wisconsin statute] is that of displaying [the State's] special hostility towards the particular biases thus singled out." *Id.* Such a result is precisely what the First Amendment forbids. *Id.*

[7] The State's *amici* dismiss the fact that existing content-neutral laws already address the behavior targeted by the hate crime law by inexplicably asserting, "[t]he fact that assaults are otherwise prohibited should increase the state's concern with discrimination rather than diminish it." National ACLU Brief at 11.

Discriminatory motive does not play the same role in antidiscrimination laws as it does in the Wisconsin statute. Nonetheless, the State and its *amici* cite several antidiscrimination laws which they suggest are functional equivalents of the hate crime law. The problems with equating these laws are apparent when analyzing the proof of discriminatory motive, for instance, under laws prohibiting discriminatory employment practices.

As the Ohio Supreme Court noted in *Wyant*, two theories are used under employment discrimination laws to prove the fact of discriminatory conduct: the "disparate-impact" theory and the "disparate-treatment" theory. 597 N.E.2d at 456. Under a disparate-impact analysis, evidence that an employment practice is neutral on its face, but falls more harshly on a protected group, can be used to show the fact of employment discrimination. *Id.* Indeed, no discriminatory motive is necessary to prove that an employer violated Title VII, 42 U.S.C. § 2000e-2(a)(1) (1981), which prohibits the hiring or firing of individuals "because of . . . race, color, religion, sex, or national origin." *See Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("[p]roof of discriminatory motive, we have held, is not required under a disparate impact theory"). A prima facie violation may be shown by "employment policies that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Id.* at 349. The disparate impact is not employed to infer the discriminatory motive of the employer; instead, it shows that the act of discrimination punished under the statute is equally possible without any motive truly related to bias. In other words, an employer may like blacks personally, but if employment practices statistically show that blacks are given far fewer promotions than whites, the employer is liable under 42 U.S.C. § 2000e-2(a)(1).

The disparate-impact analysis sharply contrasts with the proof of discriminatory motive required under the Wisconsin hate crime law. Whereas 42 U.S.C. § 2000e-2(a)(1) punishes employment discrimination whether or not it is motivated by discriminatory animus, the Wisconsin statute requires the proof of a defendant's bigoted motives or thoughts (often through the defendant's spoken word) and penalizes his otherwise punishable criminal act *more harshly* when it is so motivated.

A closer analogue to the hate crime law is found in disparate-treatment theories of discrimination; yet these, too, are distinguishable. Under the disparate-treatment analysis, an employer may not treat some groups less favorably than others because of race, color, religion, sex, or national origin. Admittedly, proof of discriminatory motive is necessary to this theory. However, proof of discriminatory motive can be inferred from the mere fact of differences in *treatment*. *See Arlington Hts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Teamsters*, 431 U.S. at 335-36 n.15. Unlike the hate crime law which directly punishes racial motive, it is the objectively verifiable conduct that is the object of punishment under 42 U.S.C. § 2000e-2(a)(1), not the bigoted attitude *per se* of the employer. *See Teamsters*, 431 U.S. at 335-36 n.15 ("[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII").

Despite the fact that discriminatory motive is "critical" under a disparate-treatment analysis, a tight nexus exists between discriminatory motive and the conduct which makes 42 U.S.C. § 2000e-2(a)(1) the most narrowly tailored means of preventing discrimination in the workplace. Because no content-neutral alternative avenue is available for civilly remedying employment discrimination, 42 U.S.C. § 2000e-2(a)(1) is constitutionally permissible under the First Amendment.

2. As written, the Wisconsin hate crime law is invalid because on its face it punishes the discriminatory motive of the actor rather than directly protecting targeted victims.

The State also attempts to justify the criminalization of discriminatory motive under the hate crime law by likening it to state statutes, including WIS. STAT. §940.20(2) (1982), which provide greater penalties when a battery victim is a police officer. Brief of Petitioner at 29. The State is correct when it says that these laws do not facially offend the First Amendment, but the justification is not, as the State asserts, that "such batteries frequently demonstrate the offenders' contempt for law enforcement." *Id.* The State is unpersuasive when it argues that penalty enhancement for batteries

against police officers and for hate crimes are constitutional for the same reasons: "[b]oth are facially valid . . . for a deceptively simple reason. On their faces, neither type of law requires or authorizes the punishment of any protected First Amendment activity." *Id.*

As the Ohio Supreme Court observed, a statute enhancing penalties for assaults against police officers "passes First Amendment analysis because the *motive* or thought which precipitated the attack" is not punished as it is under the Wisconsin hate crime law. *Wyant*, 597 N.E.2d at 456. A legislature might impose a greater penalty for battering a police officer than for battering another citizen if it found that police officers, as a class, are more likely to be exposed to battery. *See Id.* at 455-56.

If Wisconsin wishes to protect the groups which are most often the target of violent conduct, the legislature could have drafted a statute that directly imposed greater penalties for crimes against targeted victims. For example, if the Wisconsin legislature had determined that certain types of crimes against the disabled were more prevalent than against the non-disabled, it may have enhanced the criminal penalty in those cases. Such a law would achieve the result intended by the State while, at the same time, satisfy the First Amendment because neither the *motive* nor thought precipitating the criminal act are separately punished. *See R.A.V.*, 112 S. Ct. at 2548 (prohibition of conduct directed against certain persons or groups would be facially valid). This statute would pass the scrutiny required under Equal Protection analysis if the State could convincingly demonstrate that the disabled were victimized by crimes more frequently than other groups. However, as written, the Wisconsin statute does not survive a First Amendment analysis because, on its face, it separately penalizes the discriminatory motive of a criminal defendant.

3. Federal laws criminalizing deprivations of constitutional rights under the color of state law are not analogous to the Wisconsin hate crime law.

The comparison of the Wisconsin statute to 18 U.S.C. § 242 (1969) proposed by the State's *amici* also is unpersuasive. *See* National ACLU Brief at 9-10 n.8. Section 242 provides that it is a

federal crime for anyone acting under the color of law to deprive another person of rights secured by the Constitution by reason of the person's color or race. This provision is distinguishable from the Wisconsin hate crime law in that it was enacted to enforce the Fourteenth Amendment and was directed only against activities of the state and of its authorized agents. *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Cooley*, 217 F. Supp. 417, 422 (D. Colo. 1963). The Wisconsin statute, in contrast, criminalizes the racial motivation of private citizens acting in a private capacity. The concerns under the Fourteenth Amendment, to prevent state or federal government action favoring or disfavoring persons on the basis of race, are not implicated by the Wisconsin hate crime law, nor is 18 U.S.C. § 242 relevant to a First Amendment analysis of the Wisconsin statute. Thus, any attempt to justify the criminalization of thought under the hate crime law by an analogy to this federal provision is unavailing.

4. The criminal penalty imposed by the hate crime law is qualitatively more severe than any sanction available under antidiscrimination laws.

As the State concedes, antidiscrimination laws are remedial in nature. They typically impose civil sanctions on violators and, on this basis, can be distinguished from the Wisconsin hate crime statute.[8] The Wisconsin law, in contrast, punishes the bigoted thought behind a criminal act and imposes an enhanced criminal penalty of up to five years because of the content of that thought. The civil sanctions imposed by antidiscrimination laws are qualitatively less harsh than the enhanced penalty imposed by the hate crime law; thus, more tolerance can be afforded them. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (this Court has expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences are less severe).[9]

[8] *See, e.g.*, Title VII, 42 U.S.C. § 2000c-6(a) (1981) (authorizing civil actions to be brought by the Attorney General when an individual is denied admission into a public college "by reason of race, color, religion, sex, or national origin); 42 U.S.C. § 2000d (1981) (authorizing civil relief when person is excluded from public benefit program on the ground of race, color, or national origin).

[9] *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 747-48 n.25 (1978) (distinguishing the more moderate civil sanctions imposed by the Federal Communications Commission from sanctions in the event of criminal prosecution).

Perhaps because the sanctions are less severe than those imposed by the hate crime law, alleged violators of antidiscrimination laws seldom raise First Amendment challenges to these laws.[10] Indeed, if employers could be imprisoned for up to five years for employment practices motivated by racist beliefs, instead of being made to pay back wages or enjoined from such practices, it is likely that such statutes would be subject to First Amendment challenge.

The State also attempts to show that antidiscrimination laws imposing criminal sanctions or allowing punitive damages upon a finding of ill will or spite support the validity of the hate crime law. Brief of Petitioner at 31-33. For instance, the State and its *amici* refer to 42 U.S.C. § 3631 (1985), which criminalizes violent actions or threats under the color of law against the housing opportunities of any person "because of his race, color, religion, sex, or national origin." Brief of Petitioner at 33; National ACLU Brief at 9. Neither the State nor its *amici* calls attention to the fact that such actions must be taken under the color of law in order to be sanctionable. Like 18 U.S.C. § 242, this provision does not apply to private conduct; thus it is not relevant to the validity of the hate crime law, which penalizes the discriminatory thought of private persons. Moreover, while 42 U.S.C. § 3631 provides that state actors who cause the death of another while interfering with housing may be imprisoned for life, it is clear that the penalty imposed is for the act of killing, not for the discriminatory motive of the state actor.

While conceding that the vast majority of antidiscrimination laws are remedial, the State suggests that, because punitive damages are available under federal and state fair housing laws and Title VII, the enhanced criminal penalty imposed by the Wisconsin statute is proper. Brief of Petitioner at 31-32. The provision of punitive damages upon a finding of ill will or spite is frequent in many civil causes of actions and cannot, simply because such damages are available in the context of antidiscrimination laws, justify the

[10] *But see, Voluntary Ass'n of Religious Leaders v. Waihee*, 800 F. Supp. 882, 890-91 (D. Haw. 1992). This is the only case found by the undersigned counsel in which a First Amendment speech challenge was brought against a state statute prohibiting employment discrimination on the basis of sexual orientation. However, the First Amendment issue was never reached because the court found that the plaintiffs' claim was not ripe.

criminalization of thought effected by the Wisconsin hate crime law. Although punitive damages may embrace factors such as the heinousness of the civil wrong, and are sometimes characterized as "quasi-criminal," they hardly compare to a criminal penalty separately imposed on the motive of an alleged perpetrator. The Wisconsin Supreme Court correctly observed that this additional criminal penalty for the actor's bigoted motive "directly implicates and encroaches upon First Amendment rights" in a fashion that the punitive damages available under antidiscrimination laws do not. *Mitchell*, 485 N.W.2d at 812.

V. CONCLUSION

For the reasons set forth above, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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Dated: February 26, 1993